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# THE HARRY POTTER LEXICON AND THE WORLD OF FANDOM: FAN FICTION, OUTSIDER WORKS, AND COPYRIGHT

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## INTRODUCTION

Unlicensed fan fiction presents a dilemma for content owners: while fan fiction may infringe on the content owners' copyright and trademark rights, the fans who create and share it are the biggest and, for some genre works, very nearly the only, market for the owners' works. Active enforcement of intellectual property rights may alienate consumers—fans—and harm future revenues. On the other horn of the dilemma, non-enforcement of those rights may result in their loss.

Fan fiction provides fans with an opportunity to enjoy, discuss, and, most of all, inhabit the canon texts in ways that would be impossible without it. Despite its essential role, though, fan fiction's legal status remains unclear. Many fans, including academic fans, believe that fan fiction is another type of information that just wants to be free: all or nearly all non-commercial fan fiction should be protected as fair use. In contrast to previous generations, today we live in a world of symbols and texts that are all, or nearly all, owned; fan fiction is a way of combating the inevitable alienation this produces.<sup>1</sup>

Balanced against this are the interests of copyright owners. This article explores the world of fan fiction, examining three types of conflict between fans and content owners. First, the owner may object to fan fiction that alters the nature of the original work—the literary equivalent of scribbling mustaches on Grant Wood's *American Gothic* (which would earn the scribbler a quick trip to a Chicago jail cell),<sup>2</sup> or perhaps of scribbling mustaches on a postcard

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1. See generally, e.g., Leanne Stendell, Comment, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMUL. REV. 1551, 1581 (2005) ("The destruction of this 'modern folk culture' should be contemplated with hesitancy . . ."); Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L. REV. 651 (1997).

2. In the U.S. such rights in original works of art are protected by the Visual Artists' Rights Act,

of American Gothic (which is perfectly legal, if not original). Second, the owner may object because fan fiction anticipates elements of the author's own future works, precluding the author from publishing them. This, unlike the first, is an economic interest, but not necessarily a protected one. Third, the owner may object because a fan work borrows extensively from the author's own work; ordinarily this will infringe the owner's copyright if the fan work is fiction, but may not if the work is parody or non-fiction.

### I. THE WORLD OF FAN FICTION

Some works of fiction—especially, but not only, genre, science fiction, and fantasy—create detailed imaginary worlds and acquire followings of fans who study these worlds as intently, and come to know them as deeply, as the “real” world—that is, the world known not through personal experience, but through text and other media. Some fans write works of fiction set in these imaginary worlds, often involving characters created by the original author of the work; these works are fan fiction or fanfic.

For convenience, I'm going to draw a distinction in this article between fan fiction and fanfic. Fan fiction, the larger category, includes all derivative fiction and related works created by fans, whether authorized or unauthorized by the author of or current right-holder in the original work. Fanfic, at least for the purposes of this article, refers to works derived from other works currently protected as intellectual property, but not explicitly authorized and not commercially published. As we shall see, the absence of such authorization does not necessarily mean that the fanfic violates an intellectual property right. Fanfic is thus a subset of fan fiction.

Fan fiction that is authorized (such as the many commercially-published *Star Trek* novels and short stories)<sup>3</sup> or that is based on works no longer in copyright and characters not currently protected as trademarks (the works of William Shakespeare, for example) presents no legal problems; these works are often mined for source material for works that are published commercially.<sup>4</sup>

In the days before the advent of the Internet, fanfic reached relatively small audiences. It might be handwritten or typed and distributed to a few

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17 U.S.C. § 106A (2006). There is no counterpart for works of fiction.

3. See, e.g., *STAR TREK: THE NEW VOYAGES* (Sondra Marshak & Myrna Culbreath eds., 1976).

4. For fandom-related examples, see, e.g., NICK O'DONOHUE, *TOO, TOO SOLID FLESH* (Wizards of the Coast 1989) and *Star Trek: The Conscience of the King* (NBC television broadcast Dec. 8, 1966), both of which draw not only their titles but much of their content from *HAMLET*.

friends who might make copies and distribute them further. At the next higher level of formality and recognition, fanfic might be published in fan magazines (abbreviated to fanzine, and yet further to zine<sup>5</sup>). Some of these fanfics, or their authors, might attract the attention of commercial publishers. An important crossover moment for fanfic was the 1976 publication of *Star Trek: The New Voyages*, a collection of eight Star Trek short stories written by fans, with introductions to each story written by actors from the cast of the television show.<sup>6</sup>

*Star Trek: The New Voyages* made fanfic respectable, or perhaps merely acknowledged that it had already become so. It also transformed the once mostly-male domain of fandom to the subsequent enrichment of genre fiction as a whole:

[T]o a whole generation of girls, *Star Trek* on television opened up the world of science fiction. And they had a new world to write about.

.....

And, in a wave of amateur fiction completely unlike any phenomenon in science fiction history, these stories somehow got themselves published in amateur magazines. There were *hundreds* of them; or let me amend that; there were *thousands*, though I have read only a few hundred.

.....

And some of these women . . . have gone on to write other things.<sup>7</sup>

The prevailing mood was one of bonhomie: Gene Roddenberry, creator of the Star Trek television series, wrote,

[e]ventually we realized that there is no more profound way in which people could express what Star Trek has meant to them than by creating their own personal Star Trek things . . . It was their Star Trek stories that especially gratified me. I have seen them in meticulously produced fanzines, complete with excellent artwork. Some of it has even been done by professional writers, or by those clearly on their way to becoming professional writers. Best of all, all of it was clearly done with love.<sup>8</sup>

5. Fan magazines have their own complex hierarchy, ranging from perzines (personal fanzines) to semiprozines (semi-professional fanzines), some of which may cross over into commercial territory and become prozines.

6. STAR TREK: THE NEW VOYAGES, *supra* note 3.

7. MARION ZIMMER BRADLEY, *Introduction to THE KEEPER'S PRICE 10-12* (Marion Zimmer Bradley ed., 1980).

8. GENE RODDENBERRY, *Introduction to STAR TREK: THE NEW VOYAGES* (Sondra Marshak & Myrna Culbreath eds., 1976).

There is no sign that Roddenberry felt threatened by the fans' use of his intellectual property; rather, he welcomed and embraced it. And he was right: Star Trek fandom persisted, becoming the standard against which all other fandoms are measured, and eventually leading to the commercial publication of additional short stories and novels and an entire world of Star Trek movies, television shows, and merchandise. Roddenberry understood not only what Star Trek meant to the fans, but what the fans meant to Star Trek. One fan reports:

In fact, there is a probably apocryphal story that George Lucas [creator of the Star Wars movies] once went to Gene Roddenberry to ask him what to do about all the copyright violations being perpetrated by fans. Roddenberry is supposed to have told Lucas "Leave them alone, they'll make you rich!"<sup>9</sup>

Regardless of whether Roddenberry actually made this suggestion, at first, Lucas followed it, albeit cautiously:

At the height of the original Star Wars phenomenon, Lucasfilm was wary of giving its stamp of approval to the tremendous amount of fan fiction being published. Their solution . . . was to set up a no-fee licensing bureau that reviewed material and offered criticism about what might be considered copyright infringement. The ugliness of legal threats was avoided, and fans could still have their say.<sup>10</sup>

Many other authors and content owners were similarly relaxed about fanfic. But two developments were to upset this easy accommodation: slash and the Internet.

### *A. Slash*

Slash is fanfic that places male characters from the original work in same-sex romantic and/or erotic situations. Most writers of slash are female; slash thus stands at an intersection of issues of property, sexuality, and gender, and as a result, has begun to attract academic interest.<sup>11</sup> The name comes from the

9. Fan Works Inc., Star Wars! Policy: No Commercial Gain, Doesn't Sully Image, <http://www.fanworks.org/writersresource/?action=define&authorid=112&tool=fanpolicy> (last visited Aug. 8, 2008).

10. Fan Works Inc., *supra* note 9.

11. See, e.g., Mirna Cicioni, *Male Pair Bonds and Female Desire in Fan Slash Writing*, in *THEORIZING FANDOM: FANS, SUBCULTURE AND IDENTITY* 9 (Cheryl Harris & Alison Alexander eds., 1998); Shoshanna Green et al., *Normal Female Interest in Men Bonking: Selections from the Terra Nostra Underground and Strange Bedfellows*, in *THEORIZING FANDOM: FANS SUBCULTURE AND IDENTITY* 153 (Cheryl Harris & Alison Alexander eds., 1998); CONSTANCE PENLEY, *NASA/TREK: POPULAR SCIENCE AND*

punctuation mark used to divide the names of the characters, as in the archetypal slash pairing Kirk/Spock or the perennially popular Harry/Draco. Slash is subdivided into subcategories, a partial list of which might include yaoi (slash involving manga and anime characters), chanslash (explicit slash involving minor characters, such as the aforementioned Harry/Draco), and RPS (for “Real Person Slash,” such as the Dom/Lijah pairing involving two of the actors from the Lord of the Rings movies). Related concepts include het (romantic and/or erotic stories involving characters of different genders, such as Harry/Hermione), femmeslash and femslash (slash with female rather than male characters, e.g. Buffy/Faith from the television series *Buffy the Vampire Slayer*), transgender slash, friendship fiction (indicated by an ampersand, such as Harry & Draco, to denote a story in which the two characters are friends, in contrast to their canonical relationship), and shipping (devotion to a particular non-canonical romantic relationship, or ship). Ships are often given names, such as HMS Harmony (for Harry/Hermione) or Zutara (for Zuko and Katara, characters from the animated television show *Avatar: The Last Airbender*). Fiction in all of these categories—and others not listed here—with the exception of friendship fiction, is often collectively, though not entirely accurately, referred to as “slash.”

From a copyright perspective, slash and related categories of fanfic pose no problems not also posed by other forms of fanfic. Nonetheless, it seems to upset some content owners more than does non-slash fanfic.<sup>12</sup> While this makes little sense in copyright terms, it does make sense in trademark terms. Trademark law protects some marks—those deemed “famous” rather than merely “distinctive”—from tarnishment, even when there is no likelihood of confusion. Only commercial uses of the mark are covered, however; the average amateur website (or letterzine, like *Not Tonight, Spock*) is unlikely to be commercial.<sup>13</sup>

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SEX IN AMERICA (1997); Sonia Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 461 (2006); Meredith McCardle, *Fan Fiction, Fandom, and Fanfare: What’s All the Fuss?*, 9 B.U. J. SCI. & TECH. L. 433 (2003); Mollie E. Nolan, *Search for Original Expression: Fan Fiction and the Fair Use Deference*, 30 S. ILL. U. L.J. 533, 549-50, 562 (2006); Christina Z. Ranon, *Honor Among Thieves: Copyright Infringement in Internet Fandom*, 8 VAND. J. ENT. & TECH. L. 421, 447-48 (2006); Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL’Y & L. 273 (2007).

12. It must, as Penley observes, provide some amusement as well. PENLEY, *supra* note 11, at 100-01 (commenting on the implicit amused acknowledgment of slash in Spock’s line “[p]lease, Captain, not in front of the Klingons” as Kirk tries to embrace him near the end of the movie *Star Trek V: The Final Frontier*). A hint of similarly amused acknowledgment can be found in J.K. Rowling, *Harry Potter and the Half-Blood Prince* 522-23 (2005), when Harry (literally) slashes Draco with the spell *Sectumsempra*.

13. See 15 U.S.C. § 1125(c)(2)(A) (2006); see also *Playboy Enters., Inc. v. Netscape Commc’ns*

### *B. How the Internet Changed Everything*

In the generally permissive pre-Internet days slash mostly skated by. Entire zines, like *Beyond Antares* and *Alternative: Epilog to Orion*, were dedicated to Star Trek slash. But these zines circulated among a small number of people, all of whom were already dedicated fans.<sup>14</sup> With the advent of the Internet, and especially of the World Wide Web in the early 1990s, the potential audience for slash and other fanfic began to grow exponentially. Fanfics and fan art pages number in the millions, each accessible to the entire population of the world—at least, the entire population with Internet access. Entire communities exist to address particular subcategories: What if Harry Potter turned evil, got arrested, and was sent to Azkaban?<sup>15</sup> Many sites collect fanfic and categorize it in archives; “squick” warnings may be attached to denote more than usually disturbing content, such as incest, torture, or pedophilia.<sup>16</sup>

Just as the Internet did not create music piracy, it did not create fanfic. As with music piracy, however, it transformed what had been a small problem into a much bigger problem. Harry Potter fanfics alone number not in the hundreds or thousands but in the hundreds of thousands, if not millions. The music industry’s ham-handed handling of online piracy has made business history, although not in a good way. Content owners have tread more carefully with fanfic, perhaps having learned from the music industry’s attacks on its own consumer base.

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Corp., 354 F.3d 1020, 1031-32 (9th Cir. 2004). *See also* Nolan, *supra* note 11, at 569 & n.269 (citing DC Comics, Inc. v. Unlimited Monkey Bus., Inc., 598 F. Supp. 110 (N.D. Ga. 1984)), proposing that at least one court has already applied a concept of “copyright tarnishment” analogous to trademark dilution by tarnishment. Such a rule lacks the statutory basis that trademark tarnishment has and would seem to pose fair use and First Amendment problems that are not necessarily (although occasionally) present with trademark tarnishment. To the extent that such a rule seeks to protect moral rights, it may also be inconsistent with policy underlying U.S. (although not international) copyright law. *See, e.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 160 n.28, 162, 270-73 (2003).

14. For more background on Kirk/Spock, see Beyond Dreams Press, Jenna Sinclair, *A Short History of Early K/S or How the First Slash Fandom Came to Be*, <http://www.beyonddreamspress.com/history.htm> (last visited Apr. 24, 2009).

15. *See, e.g.*, Fanfiction.net, *Dark Harry Crossovers*, [http://www.fanfiction.net/community/Potter\\_in\\_Azkaban\\_Dark\\_Harry\\_Cross\\_Overs/3512/](http://www.fanfiction.net/community/Potter_in_Azkaban_Dark_Harry_Cross_Overs/3512/) (last visited Aug. 8, 2008).

16. *See, e.g.*, Livejournal.com, *Weasleycest Community*, <http://community.livejournal.com/weasleycest/> (last visited Aug. 8, 2008) (a community in which it seems every single post bears the warning, “You are about to view content that may not be appropriate for minors.”).

The claim is often made that online music file-sharing actually helps licensed music sales by introducing listeners to music that they might not otherwise hear. While the merits of this claim are unclear, it is easier to see, as Roddenberry did, the connection between fanfic and profits. Part of the fun of fandom—most of the fun, perhaps—is not in reading the books or watching the movies, but in talking about them with other fans. In the days before the Internet, this was not always possible. Now, though, however obscure a fandom might be, others share it. Those who, for example, think the adventures of the children’s comic-strip detective Slylock Fox might be better expressed as pulp-era detective stories will find what they’re looking for at *Reynard Noir*; <sup>17</sup> those who have wondered what might happen if the castaways of *Gilligan’s Island* had been visited by Gomer Pyle or the Munster family can find others’ answers or post their own. <sup>18</sup>

Larger, more current fandoms make possible a marketing synergy unknown to pre-Internet content owners. Harry Potter fandom is perhaps the best known example: fans who might otherwise have read the books and talked them over with a few friends found an entire universe of fanfic, fan art, and commentary online. What might have been entertainment for a few hours became entertainment for days and weeks. Fans who might have spent a few dollars on books—or taken the books out of the library—became fans who spent thousands of dollars on books, movie tickets, DVDs, and merchandise. J.K. Rowling made canny use of the Internet with a series of teaser games on her own website and carefully-timed releases of information to major fan sites, promoting upcoming books and movies. <sup>19</sup> The incredible success of the Harry Potter phenomenon—the books alone have sold more than 400 million volumes—would not have happened without a devoted online fan following, and fanfic is part of that. Even critical fanfic serves a valuable purpose, allowing fans to blow off steam about character or plot developments they dislike without abandoning the work altogether. For example, many readers of the Harry Potter series were dissatisfied with “Nineteen Years Later,” the epilogue to the seventh volume, in which Harry is seen at King’s Cross Station, complacently married to Ginny Weasley, with three children named, rather disturbingly, after other characters who have died. <sup>20</sup> One fan wrote “Five

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17. *Reynard Noir: The Seedy Underworld of Slylock Fox*, <http://reynardnoir.wordpress.com/> (last visited Aug. 10, 2008).

18. *Fanfiction.net, Gilligan’s Island*, [http://www.fanfiction.net/tv/Gilligans\\_Island/](http://www.fanfiction.net/tv/Gilligans_Island/) (last visited Aug. 10, 2008).

19. See J.K. Rowling, *Official Site*, <http://www.jkrowling.com/> (last visited Sept. 13, 2008).

20. J.K. ROWLING, *Epilogue to HARRY POTTER AND THE DEATHLY HALLOWS* 753, 753-59 (2007).



Years Even Later,” a short fanfic in which a middle-aged, not at all complacent Harry is again seen at King’s Cross, talking to an equally middle-aged Hermione.<sup>21</sup> This time, though, Hermione is complaining about her marriage to Ron. Harry, it turns out, has had an affair with Luna Lovegood and is divorced from Ginny. The author’s exaggerated mimicry accurately parodies J.K. Rowling’s writing style:

Harry turned to see his old friend Hermione. “Ron’s here,” he warned her warningly.

“I know that,” she said knowingly.

.....

“Still enslaving house elves?” Hermione asked finally.

“The Wizengamot awarded 12 Grimmauld Place to Ginny in the settlement,” he said simply. “Kreacher went with it.”

He, Harry, missed his Kreacher comforts.<sup>22</sup>

The fanfic serves as a useful antidote to the anodyne, even saccharine, epilogue in the book. Other fan works are more silly, such as the Potter Puppet Pals puppet skit “The Mysterious Ticking Noise.”<sup>23</sup> In the skit, Hogwarts Professor Severus Snape hears a ticking noise and begins to chant his name in time to the ticks. Various other characters appear and also begin to chant their names. The noise turns out to be a bomb, which explodes, blowing the puppets to shreds. Lord Voldemort then appears and gleefully chants *his* name: “Voldemort, Voldemort, ooh, Voldy, Voldy Voldemort!”<sup>24</sup> While the skit provides no deep insight into the characters or the story, no one who has seen a dozen schoolchildren spontaneously begin snapping their fingers in unison and chanting, “Snape, Snape, Severus Snape” can doubt its market-building power.<sup>25</sup> Ultimately fandom is about shared experience, and the more experience the fans can share, the deeper their attachment.

Internet fandoms have become vast worlds of outsider literature and art and may have influenced commercially published writers. Fan fiction as criticism has become more common,<sup>26</sup> as has meta-fanfic.<sup>27</sup>

21. Alaskaravenclaw, Epi-epilogue: 5 Years Even Later, <http://alaskaravenclaw.livejournal.com/963.html> (last visited Aug. 8, 2008).

22. Alaskaravenclaw, *supra* note 21.

23. Potter Puppet Pals, The Mysterious Ticking Noise, <http://www.potterpuppetpals.com/> (last visited Sept. 18, 2008).

24. *Id.* Voldemort is somewhat more musically gifted than his opponents, apparently; he sings his name in an approximation of the 1958 Ronald & Ruby song “Lollipop,” covered by the Chordettes and the Mudlarks in the same year. RONALD & RUBY, LOLLIPOP (RCA 1958), available at [http://www.youtube.com/watch?v=RHi\\_ECIFOHo](http://www.youtube.com/watch?v=RHi_ECIFOHo) (last visited Nov. 8, 2008).

25. Also, it’s pretty funny.

26. See, e.g., Neil Gaiman, *The Problem of Susan*, in FLIGHTS: EXTREME VISIONS OF FANTASY 393

### C. *Fanfic and Copyright Infringement*

Because it is ultimately the expression of an idea at least partly originated by another, fan works are always haunted by the specter of copyright. Analysis of this problem requires a two-step inquiry: first, whether the underlying work or element (such as a character) is protected by copyright and, second, if so, whether the fanfic or other fan work violates that copyright.

#### 1. *The First Question: Are the Underlying Works or Characters Protected?*

Copyright protects “original works of authorship fixed in any tangible medium of expression,” including the literary, dramatic, graphic, and audiovisual works upon which so much fanfic is based.<sup>28</sup> Elements of the work that are not original, however, are not protected, nor is “any idea, procedure, process, system, method of operation, concept, principle, or discovery” incorporated therein.<sup>29</sup> Even those elements that are protected are protected only for a limited time; many still-popular works can be used in fanfic without raising copyright concerns because the copyrights have expired. But determining whether the copyright on a particular work or character has expired is not always simple.

The dramatic extensions of copyright law over the past century have made the duration of the average copyright term longer than that of the average human lifetime: most people will never see the copyright expire on any work published within their own lives. The Copyright Act of 1909<sup>30</sup> set the term of copyright protection in the United States at 28 years, renewable once.<sup>31</sup> The Copyright Act of 1976 extended the term for works created after January 1, 1978 yet further, to the lifetime of the author plus fifty years for most

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(2004).

27. See, e.g., David Langford, *The Spear of the Sun*, in *Year’s Best SF 2* (1997). Langford, the editor of the United Kingdom fanzine *Ansible*, frames a Father Brown fanfic within an article in an imaginary fanzine in an alternate universe. On nested stories of this type, see generally Brian McHale, *Postmodernist Fiction* 112 (1987). For some real Father Brown stories, see Gilbert Keith Chesterton, *The Complete Father Brown Stories* (1998).

28. 17 U.S.C. § 102(a) (2006).

29. *Id.* § 102(b).

30. Copyright Act of 1909, ch. 320, 35 Stat. §§ 1075-1088 (1909) (codified as amended at 17 U.S.C. §§ 101-1332 (2006)).

31. The first U.S. copyright law, following the Statute of Anne, had set the term at 14 years, renewable once; it had been gradually increased. 1 Stat. 124 (1790). See also Statute of Anne, 8 ANNE, c. 19 (1709) (14 years); 4 Stat. 436 (1831) (28 years); 16 Stat. 212 (1870) (28 years).

individually authored or co-authored works and seventy-five years for most other works.<sup>32</sup> The term was extended further—not without controversy<sup>33</sup>—by the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) to the lifetime of the author plus seventy years and ninety-five years, respectively.<sup>34</sup>

The Copyright Amendment Act of 1992 retroactively granted an automatic copyright renewal for works published between 1964 and 1977 so long as those works were otherwise eligible for copyright renewal.<sup>35</sup> The length of this renewal term was extended by the CTEA to 67 years, so that works protected by the Act are still in copyright. The 67-year extension also applies to works created in or before 1950 only if the copyright on those works was renewed or otherwise extended in some way after 1950; in other words, it does not apply to works created before 1923.<sup>36</sup> International law adds another layer of complexity: under the Uruguay Round Agreements Act of 1994, copyright is automatically extended for works originating in countries other than the United States that are parties to the World Trade Organization (WTO) or the Berne Convention,<sup>37</sup> even if copyright renewal formalities were not complied with.

Does this seem simple? At this point, if you're a copyright lawyer, you're mentally chiding me for oversimplification; if you're not, you may be a bit confused. It can often be difficult to determine whether a particular work is still in copyright; for the layperson, it can be effectively impossible. As a practical matter, though, the most active fandoms are for works still in copyright.

A specific example may help. The worlds of Arthur Conan Doyle (especially the Sherlock Holmes stories and *The Lost World*<sup>38</sup>) have provided story elements that have been effectively mined by generations of authors, in fanfic and in commercially published works. Arthur Conan Doyle published *The Lost World* in 1912 and died in 1930.

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32. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

33. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

34. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 301-305).

35. Copyright Amendments Act of 1992, P.L. 102-307; 106 Stat. 266 (1992).

36. See generally U.S. Copyright Office, Circular 15a, *Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection* (2004), available at <http://www.copyright.gov/circs/circ15a.html> (last visited Nov. 7, 2008).

37. Convention Concerning the Creation of an International Union for the Protection of Literary and Artistic Works [Berne Convention], Art. 7(1), Sept. 9, 1886, as last revised at Paris, July 24, 1971 (amended 1979), 25 U.S.T. 1341.

38. ARTHUR CONAN DOYLE, *THE LOST WORLD* (1912).

*The Lost World's* first U.S. copyright term expired in 1940; the renewed term expired in 1968, and the work entered the public domain in the United States. Because the work originated in the United Kingdom, a party to both the Berne Convention and the WTO, it is not necessary to determine whether the copyright renewal formalities were actually complied with.

The 1998 CTEA did not affect the copyright because the work was first published before 1923. *The Lost World* is thus in the public domain in the U.S. and other authors may freely publish derivative works based upon it. Thus, in 1995 U.S. author Michael Crichton could publish a book with the same title and similar subject matter,<sup>39</sup> and in 1993 Brazilian author Marcio Souza could do the same with the U.S. publication of his postmodern *Lost World II: The End of the Third World*,<sup>40</sup> which is simultaneously a postcolonial critique of the Conan Doyle original and an ironic appreciation of it. The original Portuguese-language publication of Souza's book in 1989 might have raised copyright concerns, though; under the Brazilian copyright statute in effect from 1973 through 1998, copyright endured for sixty years after the death of the author, rather than the Berne Convention mandate of fifty years.<sup>41</sup> Consequently, *The Lost World* did not enter the public domain in Brazil until January 1, 1991—the first January 1 to fall sixty years after the death of Arthur Conan Doyle.

## 2. *The Second Question: If the Underlying Works or Characters Are Protected, Does the Fanfic Infringe Upon That Protection?*

Copyright protects the text—that is, the expression—of a work of fiction, and under certain conditions may protect characters within the work. Fanfic rarely infringes by direct imitation of the work; that would defeat the purpose of fanfic. Instead, fanfic takes familiar story elements and combines them in

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39. MICHAEL CRICHTON, *THE LOST WORLD* (1995).

40. MARCIO SOUZA, *LOST WORLD II: THE END OF THE THIRD WORLD* (Lana Santamaria trans., 1993), originally published as *O FIM DO TERCEIRO MUNDO* (Marco Zero ed., 1989). Nor does Crichton's work infringe Souza's copyright, because the (few) elements Crichton's work has in common with Souza's are not original to Souza.

41. Lei No. 5.988/73, Art. 42, § 2 (granting protection for a period of 60 years from the first of January of the year following the author's death), repealed by Lei No. 9.610, Feb. 19, 1998 available at [http://www.wipo.int/clea/en/text\\_html.jsp?lang=EN&id=514#P144\\_15184](http://www.wipo.int/clea/en/text_html.jsp?lang=EN&id=514#P144_15184) (English translation). Brazil has been a party to the Berne Convention since 1922. Brazil's current copyright statute, Law No. 9610 on Copyright and Neighboring Rights, Art. 41, provides that "[t]he author's economic rights shall be protected for a period of 70 years as from the first of January of the year following his death, subject to observance of the order of succession under civil law."

unfamiliar ways. Doing so may nonetheless violate the copyright in the original work if the new work is a derivative work because the copyright owner has the sole right to control the making and distribution of derivative works.<sup>42</sup>

In a literary sense, fanfic is necessarily derivative; it cannot function otherwise. Tolkien pointed out that this was true of all fantasy, and perhaps of all fiction: “[T]he Cauldron of Story[] has always been boiling, and to it have continually been added new bits . . . .”<sup>43</sup> In a legal sense, though, the bar for finding a work to be derivative is set somewhat higher. Once again, a visit to our three *Lost Worlds* may be instructive.

Even if the original *Lost World* had still been in copyright at the time Crichton’s novel of the same name was published, Crichton’s version would not have infringed the copyright in the original because Crichton’s *Lost World* is not a derivative or copy of the original; rather, it is a sequel to his earlier and wildly successful novel (and subsequent movie) *Jurassic Park*.<sup>44</sup> In fact, Crichton’s *Lost World* is more a sequel to the movie than to the book: a central character in *Lost World* is mathematician Ian Malcolm (played by Jeff Goldblum in the movie), who was dead at the end of *Jurassic Park*, the novel, but alive at the end of *Jurassic Park*, the movie. Crichton’s *Lost World* is only tangentially fan fiction; by its title and minor details (such as the reference to an absent character named John Roxton, who was also a character in Arthur Conan Doyle’s original), it acknowledges a debt to the original work, but its major characters and specific setting are original to Crichton. Crichton’s story is independent of the original and can be fully appreciated by those with no familiarity with the original. The major story elements that tie it to the original are dinosaurs and the general Latin American setting; Arthur Conan Doyle did not create dinosaurs or Latin America and can claim no copyright in them.

Souza’s *Lost World II*, on the other hand, is more clearly identifiable as fan fiction and might have posed copyright problems had the original still been in copyright in the U.S. when the U.S. version of Souza’s work was published.<sup>45</sup> While the story stands on its own, it is easier to understand—and much funnier—if the reader has also read the original or at least seen or heard one of the several film, television, or radio adaptations of it.<sup>46</sup> The novel’s

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42. 17 U.S.C. § 106(2).

43. J.R.R. TOLKIEN, *Tree and Leaf*, in *THE TOLKIEN READER* 26 (1966).

44. MICHAEL CRICHTON, *JURASSIC PARK* (1990); *JURASSIC PARK* (Universal Studios 1993).

45. See, e.g., *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001) (vacating an injunction against the publication of *The Wind Done Gone*, a fictional work based off *Gone With the Wind*).

46. See, e.g., *THE LOST WORLD* (First National Pictures 1925); *THE LOST WORLD* (Twentieth

protagonist, Jane Challenger, is the granddaughter of Conan Doyle's protagonist, Professor George Challenger; the novel's central conceit is that she discovers, in the Brazilian Amazon, "reasonably healthy and well-fed species of capitalists considered extinct in England since the eighteenth century."<sup>47</sup> Classical capitalism and the economy of the author's own country are not the only dinosaurs in this story: the concepts inherent in Jane Challenger's journey—the idea of a "third world" that does not come into fully realized existence until it is "explored" and "discovered" by a representative of the world's "civilized peoples"—are dinosaurs as well: big, dangerous, and long past their time.<sup>48</sup>

The majority of fan fiction, though, is fanfic—informally published for the entertainment of the author and other fans, or for some other non-commercial reason. Even fan fiction like Souza's—formally and commercially published in order to make money for the author—may survive even in the face of copyright if it is protected fair use. However, fair use will be harder to show for such works than for non-commercial works. Souza's novel would probably survive copyright scrutiny because to the extent it borrows from the original, it does so as parody and commentary.

## II. BEYOND FANFIC: A SPECIAL NOTE ON SATIRE, FILK, AND FAN VIDEOS

Fan-created content takes many forms in addition to fanfic. Of these, original graphic art and videos pose fewer copyright problems. Art that imitates a protected graphic character poses somewhat more problems,<sup>49</sup> while work that combines copyrighted and original material may fall outside the scope of fair use even if intended as a parody.

Works that are satires, rather than parodies, may not enjoy the same level of protection. Again, the distinction here is legal rather than literary: "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."<sup>50</sup> A great deal of fanfic borrows from one work to poke fun at another. When the humor is directed at both works, there is no problem. When

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Century-Fox 1960).

47. SOUZA, *supra* note 40.

48. *Id.*

49. See Leslie A. Kurtz, *The Independent Legal Lives of Fictional Characters*, 1986 WIS. L. REV. 429, 445-51 (1986).

50. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994).

one serves only as a vehicle, though,<sup>51</sup> or is copied substantially more than parody requires, there may be a problem. Song parodies and anime music videos are especially problematic.

Fan song parodies are often called filks, although the two terms are not completely overlapping: filks can be original songs as well as new lyrics set to the tune of existing songs. A filk can be set to the tune of a work out of copyright, such as “The Yellow Rose of Texas,” thus avoiding the problem altogether.<sup>52</sup> It can also be set to a tune that has been parodied so frequently that it might reasonably be considered fair game, such as “My Favorite Things,”<sup>53</sup> which even appears, without copyright notice, on a U.S. government website.<sup>54</sup> Many filks, though, use the tunes of works still in copyright and still actively protected by the copyright owners.<sup>55</sup> Posting these proposed alternate lyrics to a well-known tune should not, by itself, pose a copyright problem, as long as the lyrics are sufficiently original, because the music is not present in the text. These songs may be performed at conventions, though, and performances may be posted online; at this point both the copyright and the performance right in the music come into play. While non-recorded performances in the halls of the San Diego Convention Center during Comic-Con may skate by unnoticed, posted recordings of those performances may not.

Fan videos (fanvids) have even less leeway. The term is applied to a wide variety of fan videos that use clips from movies and television shows set to music; “vidding” is the process of making such videos. A subset of fanvid, the “anime music video” or “AMV” (constructed from anime clips set to music), has become sufficiently popular that the term AMV is often, if not correctly, used to describe all fanvids.

Fanvids present a double problem: while fanfic involves mostly original material created by the fan author, and song parodies have original lyrics but

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51. See, e.g., *Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir. 1997) (affirming an injunction against the publisher of a book about the O.J. Simpson murder trial imitating Dr. Seuss's style).

52. See Robin Smallburrow, *The Yellow Rose of Rohan*, [http://frogmorton4.tripod.com/filk/Yellow\\_Rose\\_of\\_Rohan.htm](http://frogmorton4.tripod.com/filk/Yellow_Rose_of_Rohan.htm) (last visited Nov. 10, 2008).

53. RICHARD RODGERS & OSCAR HAMMERSTEIN, *My Favorite Things* (1959) (song); see The Green Dragon, *My Favorite Things*, <http://www.geocities.com/greendragon1420/MyFavoriteThings.htm> (last visited Nov. 10, 2008).

54. National Institutes of Health, Department of Health & Human Services, *My Favorite Things*, <http://kids.niehs.nih.gov/lyrics/favorite.htm> (last visited Nov. 10, 2008).

55. See, e.g., William H. Hsu, *Master Gandalf's Lowly Hobbit Band*, *The Red Songbook of Westmarch*, <http://www.kddresearch.org/Tolkien/Humor/RedSOW/> (last visited Nov. 10, 2008) (to the tune of the Beatles' *Sergeant Pepper's Lonely Hearts Club Band*).

not original music, fanvids have neither original artwork nor original music. All of the material used to create the fanvid was originally created by others, and all of it, typically, is protected by copyright. This problem is not unique to vidding; it is shared by mash-ups generally.<sup>56</sup> In addition to the copyright in the material used to construct the fanvid, the fanvid itself is a derivative work subject to all the concerns addressed above with regard to fanfic.

A fanvid that draws all its material from a single source has only one content owner to worry about; if that content owner is inclined to acquiesce, the fanvid author faces few problems. “They’re Taking the Hobbits to Isengard,”<sup>57</sup> for example, is a comical remix of scenes and music from the Lord of the Rings movies; it draws entirely from a single source. On the other hand, “Aang Can’t Wait to Be King”<sup>58</sup> sets scenes from the Nickelodeon series *Avatar: The Last Airbender* to Elton John’s song “I Just Can’t Wait to Be King” from Disney’s *The Lion King*. While Nickelodeon has little economic interest in suing or threatening to sue its fans (or, at least, that interest is outweighed by its interest in maintaining the fans’ goodwill), in this case Disney has nothing to gain from the use of its song in the video. Disney, though, is every bit as dependent on the goodwill of fans as Nickelodeon is. And there is probably considerable overlap between the audiences of *Avatar* and *The Lion King*. But a Kirk/Spock slash video, setting clips from the original Star Trek TV series to the song “Closer” by Nine Inch Nails,<sup>59</sup> is more one-sided: the song is being used entirely for its effect when juxtaposed with the Star Trek characters, and there is no particular benefit to Trent Reznor (Nine Inch Nails) from allowing its use, other than the benefit of added exposure. Where the incongruity between the music and the images is greater, the humor is greater too—but the possibility that both content owners will take exception also increases. A fan video of the Archies playing the Sex Pistols’ “God Save the Queen”<sup>60</sup> not only infringes on the copyright of the song, but may also be inconsistent with the “wholesome” image the Archie Comics company tries to market. Fanvids, amusing as some of them are, are something

56. See Robert S. Gerber, *Mixing It Up on The Web: Legal Issues Arising from Internet “Mashups,”* 18 INTELL. PROP. & TECH. L.J. 11 (2006).

57. Erwin Beekveld, *They’re Taking the Hobbits to Isengard*, <http://www.albinoblacksheep.com/flash/hobbits> (last visited Nov. 10, 2008).

58. Aangi07, *Aang Can’t Wait to Be King*, [http://www.youtube.com/watch?v=3LC\\_FivJc80](http://www.youtube.com/watch?v=3LC_FivJc80).

59. Killa & T. Jonesy, *Closer (fan video)*, widely available, e.g., at <http://www.youtube.com/watch?v=1PwpcUawjK0> (last visited Nov. 10, 2008).

60. *God Save the Queen*, <http://www.transbuddha.com/mediaHolder.php?id=1730> (no longer available; the more sentimental *Hey Ya Charlie Brown* is still available everywhere, though; *Hey Ya Charlie Brown*, <http://www.youtube.com/watch?v=KGnYw-OuCnI> (last visited Nov. 10, 2008)).



of a guerilla art form, and will probably eventually be chased from the well-lit public spaces of YouTube to some of the darker back alleys of the Internet. In particular, the music industry is notoriously diligent in enforcing its copyrights.

### III. THREE FANFIC PROBLEMS

There are probably a limitless number of possible reasons for a content owner to object to fanfic, but the probable reasons fall into the three general categories described in the Introduction. First, the owner may object to the way in which the original material is used or depicted. U.S. copyright law recognizes only economic, not moral, rights in copyrighted works and characters, and provides no relief to the content owner in the absence of an actual infringement of copyright.<sup>61</sup> U.S. trademark law, however, will protect famous trademarks from commercial uses that might dilute the mark by blurring or tarnishment.<sup>62</sup> Second, the owner may object because the fanfic exposes him or her to liability for copyright infringement in his or her future work. Third, the owner may object because the fanfic borrows extensively from his or her own work. A look at an example of each may be instructive.

Slash and related stories can be counted upon to raise the first objection. Every author has a personal squick threshold, and even before that is reached the author may object to an “unrealistic” portrayal of his or her characters or world, as happened with Larry Niven and his *kzinti*. For an example of the second objection and the possibly undesirable consequences of acting upon it, we’ll visit the planet Darkover. After a Darkover fanfic made it impossible for her to publish her own work, author Marion Zimmer Bradley took the drastic step of curtailing her own fandom. The third objection provides the only published opinion dealing specifically with fan writing, although not yet fanfic, to date. Harry Potter author J.K. Rowling has taken the surprising step of suing one of her most prominent fans for attempting to publish material commercially—even though the same material had long been available online, with Rowling’s approval.<sup>63</sup>

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61. International copyright law does address moral rights. *See* Berne Convention, art. 4bis, 25 U.S.T. at 1349; *see also supra* note 13, on the idea of “copyright tarnishment.”

62. *See* 15 U.S.C. § 1125(c) (2006).

63. Rowling’s and Warner Brothers’ complaint draws a distinction that the court, and so far the law generally, does not formally acknowledge, but that may become important in assessing the legality of fanfic and other fan-generated content:

there is a significant difference between giving the innumerable Harry Potter fan sites latitude to discuss the *Harry Potter* Works in the context of free of charge, ephemeral websites and

*A. Larry Niven, Elf Sternberg, and Kzinslash*

Larry Niven is a science fiction author best known for his Known Space series of stories, especially the novel *Ringworld*<sup>64</sup> and its sequels. The Known Space stories depict several alien species; one that features prominently is the kzinti (singular kzin). The kzinti are large and tiger-like in appearance and, to some extent, behavior: They are aggressive carnivores, warlike, and prone to violence. Their saving grace is personal incorruptibility and adherence to a rigid code of honor. The kzinti also appeared in an episode of the Star Trek animated series<sup>65</sup> authored by Niven and were subsequently referred to at several places in the sprawling agglomeration of materials that make up the Star Trek universe.<sup>66</sup>

Elf Sternberg describes himself as a writer of “science fiction, fantasy and erotica.”<sup>67</sup> He has been posting slash and het fanfic online for at least two decades, since the days of Usenet. Sternberg wrote and posted a slash story involving male kzinti.<sup>68</sup>

Niven had previously enjoyed a positive relationship with fandom. In the introduction to *The Ringworld Engineers*, published in 1980, he shows an attitude similar to Roddenberry’s attitude toward Star Trek fandom:

*Ringworld* is ten years old; and I have never stopped getting letters about it. People have been commenting on the assumptions, overt and hidden, and the mathematics and the ecology and the philosophical implications, precisely as if the Ringworld were a proposed engineering project and they were being paid for the work.

....

You who did all that work and wrote all those letters: be warned that this book would not exist without your unsolicited help. I hadn’t the slightest intention of writing a sequel to *Ringworld*. I dedicate this book to you.<sup>69</sup>

allowing a single fan site owner and his publisher to commercially exploit the *Harry Potter* Books in contravention of Ms. Rowlings’ wishes and rights and to the detriment of other *Harry Potter* fan sites.

First Amended Complaint at 3, Warner Bros. Entm’t, Inc. v. RDR Books, (2007) (No. 07 Civ. 9667).

64. LARRY NIVEN, *RINGWORLD* (1970).

65. *Star Trek: The Animated Series, The Slaver Weapon* (NBC television broadcast Dec. 15, 1973).

66. For a list of examples, see Memory Alpha, *Kzinti*, [http://memory-alpha.org/en/wiki/Kzinti#Kzintis\\_in\\_the\\_Star\\_Fleet\\_Universe](http://memory-alpha.org/en/wiki/Kzinti#Kzintis_in_the_Star_Fleet_Universe) (last visited Dec. 16, 2008).

67. Elf Sternberg, *Pendorwriting: Quality Science Fiction and Fantasy Erotica Since 1989*, <http://pendorwright.com/about/> (last visited Aug. 12, 2008).

68. The story was posted in Sternberg’s online serial, *The Journal Entries*, and later removed.

69. LARRY NIVEN, *THE RINGWORLD ENGINEERS* vii-viii (1980).

The dedication is perhaps a deliberate echo of L. Frank Baum's prologue to *The Patchwork Girl of Oz*, which thanks the fans of the Oz books for coming up with a way to learn more about happenings in Oz even after it had been permanently cut off from the rest of the world in the previous volume (which Baum had intended to be the last).<sup>70</sup> Niven has acknowledged *The Wonderful Wizard of Oz*<sup>71</sup> as an influence on *Ringworld*<sup>72</sup> and titled a novel *The Patchwork Girl*.<sup>73</sup>

Niven's and Sternberg's dispute never came to court, and the only sources for what happened, and what the participants thought about it, are their own published statements. Niven apparently sent Sternberg a cease-and-desist letter, and his attitude toward fandom and fanfic seems to have become a bit less idealistic:

Last month a stranger in New Jersey asked permission to use the kzinti in his fanzine. (Fanzines, fan magazines, exist strictly for recreation). Gary Wells wanted nothing of Known Space, just the kzinti, embedded in a Star Trek background.

I wrote: *I hereby refuse you permission to use the kzinti in any literary property. The last guy who did that involved the kzinti in a sadomasochistic homosexual gangbang, badly, and published it on a computer network. A friend alerted me, and we spoke the magic word and frightened him away. (Lawsuit.) I'm still a little twitchy on the subject, so don't take any of this too personally. . . .*

Wells persisted. He sent me the Fleet bio for his kzint: a crewman aboard a federation battlewagon. He's got his format well worked out. It would have been fun to see what he might do with it; but I'm going to refuse him anyway. I don't want the playground getting too crowded.

I hope the network bandit doesn't turn up again.<sup>74</sup>

At the time slash fiction was not completely a new phenomenon, but the wide reach it could attain via the Internet (at the time, through Usenet newsgroups) was. This may have been Niven's first encounter with slash based on his own work, and he may have been one of the first authors to have this experience.

His reaction shows an awareness of the damage to his relationship with the fans; he seems distressed at the thought of having to expel the other kids

70. L. FRANK BAUM, *Prologue to THE PATCHWORK GIRL OF OZ* 15-16 (1913).

71. L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* (1900).

72. NIVEN, *RINGWORLD*, *supra* note 64; Slashdot, *Ladies and Gentlemen, Dr. Larry Niven*, <http://interviews.slashdot.org/article.pl?sid=03/03/10/167206&mode=thread&tid=134&tid=192> (Mar. 10, 2003) [hereinafter Niven Slashdot Interview].

73. LARRY NIVEN, *THE PATCHWORK GIRL* (1984). Niven is also the co-author of a Divine Comedy fan fiction novel that critically examines the theological assumptions underlying Dante's original. LARRY NIVEN & JERRY POURNELLE, *INFERNO* (1976). Dante Alighieri's work is, of course, long out of copyright.

74. LARRY NIVEN, *Introduction to MAN-KZIN WARS IV* (Larry Niven ed., 1991).

from his “playground.” Doing so may not have served him well; another phenomenon that was not yet fully understood was the power of the Internet to disseminate information and allow anyone and everyone to express an opinion. Niven was, and still occasionally is, mocked online by fans, sometimes viciously:

Larry Niven actually had his lawyers send a cease-and-desist letter to the author (Elf Sternberg) for using his furry sapient felinoid aliens (think bipedal tigers), the Kzinti. Now they’re called Felinzi. Niven lambasted Elf for bad writing, but the Journal Entries are a godzillion times better than the *crap* Niven is cranking out these days. Keep counting your money, Larry; at least Elf still has a soul.<sup>75</sup>

Niven’s hope that the “bandit” would not turn up again was not to be realized either. Apparently in response to Niven’s mention of the incident in print, Sternberg posted an explicit slash story, “The Only Fair Game,”<sup>76</sup> claiming that the story was a parody protected under *Campbell v. Acuff-Rose Music*.<sup>77</sup>

Twelve years after denouncing Sternberg’s slash in print, Niven claimed not to remember it,<sup>78</sup> though the question assumed that “The Only Fair Game” was the original story to which Niven objected.<sup>79</sup> However, it is not entirely clear whether “The Only Fair Game” was the basis for Niven’s first objection. Sternberg describes it as “the infamous story that pissed off Larry Niven and

75. Ron’s Links Page, <http://ron.ludism.org/links.html> (last visited Aug. 12, 2008); *see also*, minus the venom, Posting of Darrin Bright to *Websnark: Protecting Gnomish Habitat Since 2008*, Aug. 16, 2006, [http://www.websnark.com/archives/2006/08/also\\_theres\\_a\\_g.html](http://www.websnark.com/archives/2006/08/also_theres_a_g.html) (“One of the more infamous incidents is Larry Niven sending a ‘cease and desist’ letter to Elf Sternberg over the erotic fanfic ‘The Only Fair Game.’ There was no legal action beyond that, but Niven still gets needled about it occasionally.”).

76. Elf Sternberg, *The Only Fair Game*, [http://www.pendorwright.com/other/html/The\\_Only\\_Fair\\_Game.html](http://www.pendorwright.com/other/html/The_Only_Fair_Game.html) (last visited Aug. 12, 2008).

77. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

78. Niven Slashdot Interview, *supra* note 72.

79. *Id.* (the questioner identified “The Only Fair Game” as the story giving rise to the cease-and-desist letter and Niven may have been confused). *See* Posting of LionMage to Slashdot, <http://interviews.slashdot.org/article.pl?sid=03/03/10/167206&mode=thread&tid=134&tid=192> (last visited Aug. 12, 2008):

What’s interesting, though, is that Elf claims “The Only Fair Game” is the original story where he ran afoul of Niven. I seem to recall an earlier work of Elf’s that mentioned Kzinti, which was later edited so that the one Kzin character was changed to some sort of anthropomorphic tiger. (There have to be some early archives of the Usenet posts that contain the original version of the story.) I remember Niven’s editorial in one of the Man Kzin Wars books, where he blasts Elf (though not by name) for writing a rather bad story involving a “sodomasochistic homosexual gang-bang.” I’ll never forget that line. Anyway, I assumed that Niven was speaking about this other, earlier story, and had no idea “The Only Fair Game” even existed until today.

(Mar. 10, 2003, 1:54 P.M.).

started me down the career of infamy,”<sup>80</sup> but he also says he rewrote the original stories to

remove[e] anything about Kn\*wn Sp\*ce. . . . And Larry said he’d drop the matter. He didn’t. It showed up again, in [*Man-Kzin Wars IV*]. I understand the point he was addressing in MKW4, but rather than just say, “No, it’s my work,” he dragged the incident in. I decided to have one last laugh, and wrote one final story, which is absolutely a parody of Niven’s universe—“The Only Fair Game,” which is also on my home page and which is protected under US law (see: The Estate of Roy Orbison vs. Two Live Crew.)<sup>81</sup>

He answers the question “Is it true that Larry Niven hates you?” with:

Yes, it’s true. The story that aroused his ire no longer exists, as I deleted it and all references to it a long, long time ago, but every once in a while I see it reposted. Even though I have separated myself from the story a LONG time ago, it’s hard to kill something once it’s been released onto the ‘net. :-)<sup>82</sup>

### *1. If There Was No Economic Harm, Why Was Niven So Upset?*

There seems to be an implied value judgment in Niven’s use of the words “somasochistic homosexual gangbang,” making it easy to dismiss his apparent dismay as simple homophobia, and some have done so.<sup>83</sup> However, the actual objection seems to be more complex. Niven complains that “[t]he bandit’s kzin was ridiculous.”<sup>84</sup> Later he elaborated, “I don’t buy its premise. An older species won’t have human versatility in sex: sexual responses will be all hard wired.”<sup>85</sup>

He seems unconcerned about possible economic harm from the work; although claiming that the story “does [violate copyright], of course,” he also observed wryly that “I notice the ‘desist’ had no effect.”<sup>86</sup> What seems to upset him the most is that the kzin in Sternberg’s stories do not conform to the

80. *Mia’s Index of Anthro Stories: Elf Sternberg*, [http://www.furry.de/miavir/stories/sternberg\\_elf.html](http://www.furry.de/miavir/stories/sternberg_elf.html) (last visited Aug. 12, 2008).

81. Posting of Elf Sternberg to “What ever happened to Niven’s Known Space?,” [http://groups.google.com/group/rec.arts.sf.written/browse\\_thread/thread/31365c23e529ee85/6eadf6478c3e30dd?#6eadf6478c3e30dd](http://groups.google.com/group/rec.arts.sf.written/browse_thread/thread/31365c23e529ee85/6eadf6478c3e30dd?#6eadf6478c3e30dd) (Dec. 14, 1995, 4:00 A.M.), the case referred to is apparently *Campbell*.

82. Elf Sternberg, *The Journal Entries FAQ*, <http://everything2.com/e2node/the%2520Journal%2520Entries%2520FAQ> (last visited Aug. 12, 2008).

83. See, e.g., Posting of Leslie R. (Member # 1599) to The Nice, Supermegatopia forum, [http://nice.purrsia.com/cgi-bin/ultimatebb.cgi?ubb=print\\_topic;f=10;t=004414](http://nice.purrsia.com/cgi-bin/ultimatebb.cgi?ubb=print_topic;f=10;t=004414) (Jan. 18, 2007, 3:29 A.M.). (Sternberg says “The Only Fair Game” “digs into Larry’s well-rumored aversion to any sexuality that’s even a little bit ‘weird.’ . . . Okay, so Larry doesn’t like gays or leatherfolk. . . . A lack of creativity in one department does not make Larry talentless. He’s still one of my top five favorite fiction writers[.]”)

84. Niven Slashdot Interview, *supra* note 72.

85. *Id.*

86. *Id.*

detailed biological and behavioral rules that he must have spent considerable effort creating. In copyright terms, this is closer to the assertion of a moral right than to any right recognized in U.S. law. It might conceivably make sense in trademark terms, save that Sternberg's work is not a commercial use.<sup>87</sup>

The Niven/Sternberg dispute highlights the gap between the expectations of content creators and the rights actually provided by U.S. law. Sternberg is as confused as Niven, if not more so, saying, "Niven, attempting to live off the sweat of his own brow, does have the right to control how his work is used." Niven, like all authors, has the right to control the products of his creativity—original works of authorship fixed in a tangible medium of expression—but not the products of the sweat of his brow.<sup>88</sup> No matter how much sweat he expends, without originality there can be no copyright.

## *2. Does Niven Have a Copyright in the Kzinti, and Did Sternberg Infringe Upon It?*

Copyright protects the expression of an idea; stories and, in some instances, characters in a work of fiction can be protected by copyright.<sup>89</sup> "The Only Fair Game," though, does not borrow its story or its characters from Niven's work; the plot and the characters are Sternberg's creations. The kzinti are not, but they are not a "character" either, and feline aliens are commonplace in SF universes; despite their coined name, the kzinti are unlikely to be protected by copyright.

However, Sternberg's work may also violate copyright as an impermissible derivative work. Fanfic is "derivative" in a literary sense, if not necessarily in a legal sense; it depends upon an appreciation of the original, shared between the author and the reader, for enjoyment and often for

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87. Because fanfic uses are generally not uses in commerce, issues of trademark infringement and dilution are unlikely to arise. There may be exceptions, of course. It is more difficult to say whether Sternberg's use is a use in commerce. "The Only Fair Game" is offered on Sternberg's website for free, not for sale. The website has neither banner ads nor pop-ups, although it is possible that some of the links on the site could be sponsored. The site does solicit and accept donations through two online payment services, PayPal and Amazon's Honor System. However, it appears to be a hobby site. See generally Joseph E. Edwards, *What constitutes "in commerce" within meaning of § 32(1)(a) of Lanham Trade-Mark Act (15 U.S.C.A. § 1114(1)) giving right of action for infringement of trademark "in commerce,"* 15 A.L.R. FED. 368 (1973 & Supp. 2008).

88. *Feist Publ'ns v. Rural Telephone Serv. Co.*, 499 U.S. 340 (1991); 17 U.S.C. § 102 (2006).

89. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); see also generally Kurtz, *supra* note 49; but see *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945 (9th Cir. 1954), *cert. denied*, 348 U.S. 971 (1955) (no copyright in fictional detective Sam Spade).

comprehensibility. Niven, as the owner of the copyrights in the Known Space stories, has the right to control works derived from those stories.<sup>90</sup>

The bar for finding a work to be derivative is set relatively high. A translation of *Ringworld* into French<sup>91</sup> is a derivative work, as would be an adaptation of the story into some other form, such as a musical comedy.<sup>92</sup> But a work is not derivative unless the amount of copying from the original is substantial.<sup>93</sup> SF relies heavily on certain tropes, including, inter alia, space travel and feline aliens. The Wikipedia entry for “List of Fictional Cat-Like Aliens” lists thirty-six examples, many with their own Wikipedia entries.<sup>94</sup> Even a casual glance reveals that some fictional species are omitted.<sup>95</sup> So including feline aliens in his work, while not particularly original, does not by itself make Sternberg’s work derivative of Niven’s. The fact that the aliens are called “kzinti,” a word invented by Niven, and that they are intended to be understood by the reader as Niven’s kzinti, is still probably not enough to render the work derivative. The kzinti are not a character, but a hypothetical alien species that has appeared in two widely-recognized but separate SF universes: Known Space and Star Trek. They are not so much an expression of an idea as an idea; the words “kzin” and “kzinti” alone seem too slim a reed to support a claim that all works incorporating them are derivative.

### 3. Is “*The Only Fair Game*” Protected as Fair Use?

Sternberg’s use of the kzinti in “*The Only Fair Game*” is, as we have seen, almost certainly not copyright infringement. Indeed, the kzinti do not appear to be protected by copyright in the first place. That is not true of all fanfic, however. Characters like Captain James T. Kirk the starship captain, Harry Potter the boy wizard, and Captain Jack Sparrow the pirate are almost certainly protected. Even the use of these characters, however, may be protected as fair use.

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90. 17 U.S.C. § 106(2) (2006).

91. LARRY NIVEN, *L’ANNEAU-MONDE* (Fabrice Lamidey trans., 2005).

92. See generally, e.g., *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366 (2d Cir. 1993).

93. *Litchfield v. Spielberg*, 736 F.2d 1352 (9th Cir. 1984), cert. denied, 470 U.S. 1052 (1985) (The mere fact that the movie *E.T.: The Extra-Terrestrial* and plaintiff’s play *Lokey from Maldemar* are both about aliens stranded on Earth and seeking to return home does not make the former derivative of the latter, even though the aliens in both stories have similar telekinetic powers and the stories end similarly.).

94. Wikipedia, *List of Fictional Cat-Like Aliens*, [http://en.wikipedia.org/wiki/Cat-like\\_alien](http://en.wikipedia.org/wiki/Cat-like_alien) (last visited Dec. 16, 2008) (The kzinti are the only species to appear twice, in both their Known Space and Star Trek incarnations).

95. For example, the Catmen of Marion Zimmer Bradley’s *Darkover* series are not mentioned.

Even if the kzin species were protected by copyright, Sternberg's use might be protected by the fair use exception to the exclusive rights of the copyright holder:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>96</sup>

The first of these factors, the purpose and character of Sternberg's use, does not seem to weigh against Sternberg. While his work was not "for nonprofit educational purposes," and thus not particularly favored by the statute, it was also not "of a commercial nature," and thus not particularly disfavored either. The original kzin slash story seems to have been written for the entertainment of Sternberg and other fans; "The Only Fair Game" seems to have been written for those same purposes, as well as for criticism or comment. This does not mean, of course, that it succeeded. In the words of one fan:

Not that I think Elf's stories are worth the electrons wasted in transmitting them. Those of us old enough to remember Elf's massive cross-posts of his fiction to a number of Usenet newsgroups (many of which were, in fact, inappropriate venues for this sort of work) will remember the complaints about wasted bandwidth and so forth. At least now that this junk is all archived on the web, only people who want to see it can go seek it out, and the rest of us are spared.<sup>97</sup>

But the quality of the work is not a factor in determining fair use. To include quality as a criterion would inevitably require the courts to make judgments for which they are ill-qualified. In many cases, such judgments may be purely subjective: "It would be a dangerous undertaking for persons trained

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96. 17 U.S.C. § 107 (2006).

97. Posting of LionMage (318500) to Niven Slashdot Interview, *supra* note 72, post by LionMage (318500)72 (Mar. 10, 2003, 1:54 P.M.) (#5477971).



only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits.”<sup>98</sup>

The two extremes listed in Section 107(1) do not by themselves dispose of the “purpose and character” question:

“Purpose” in fair use analysis is not an all-or-nothing matter. The issue is not simply whether a challenged work serves one of the non-exclusive purposes identified in section 107, such as comment or criticism, but whether it does so to an insignificant or a substantial extent. The weight ascribed to the “purpose” factor involves a more refined assessment than the initial, fairly easy decision that a work serves a purpose illustrated by the categories listed in section 107.<sup>99</sup>

“The Only Fair Game” takes a story element from Niven’s work and presents it in a new way, apparently intended to be disconcerting. It seems to be a deliberate challenge to Niven’s work; on balance, the first factor probably weighs somewhat in Sternberg’s favor.

The Known Space stories (and for that matter the Star Trek stories, in various media) are creative and fictional works, so the second factor, the nature of the copyrighted work, favors Niven: “the second factor, if it favors anything, must favor a creative and fictional work, no matter how successful.”<sup>100</sup>

The third factor, “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” favors Sternberg.<sup>101</sup> Almost nothing of Niven’s work is used in “The Only Fair Game,” other than the kzinti themselves.<sup>102</sup> To the extent that it is, as Sternberg claims, a parody, it

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98. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. at 582 (1994) (quoting *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903)). *Campbell* substitutes the more general “a work” for Bleistein’s “pictorial illustrations.” At issue in *Bleistein* was the ability to copyright circus posters, which are appreciated today, as they were not in their heyday, as an art form. See, e.g., *Circus Posters in the Princeton University Library*, [http://libweb5.princeton.edu/visual\\_materials/Circus/TC093.html](http://libweb5.princeton.edu/visual_materials/Circus/TC093.html) (last visited Aug. 15, 2008).

99. *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1374 (2d Cir. 1993).

100. *Id.* at 1376. See also *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984) (“The scope of the fair use defense is broader when informational works of general interest to the public are involved than when the works are creative products.”); *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 563 (1985) (“The law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy.”); *Stewart v. Abend*, 495 U.S. 207, 237-38 (1990); MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][2][a], at 9 (LexisNexis 2008) (“copyright protection is narrower, and the corresponding application of the fair use defense greater, in the case of factual works than in the case of works of fiction or fantasy”); see also generally *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984).

101. *Id.* at 1374 n.3 (citing 17 U.S.C. § 107 (1988)).

102. See generally *Twin Peaks Prods., Inc.*, 996 F.2d at 1376-77.

must, to achieve its purpose, include enough elements of known space—in this case, the appearance and mannerism of the kzinti—to conjure up Niven’s original in the mind of the reader.<sup>103</sup>

The fourth factor, “the effect of the use upon the potential market for or value of the copyrighted work,” outweighs each and perhaps all of the other three in importance.<sup>104</sup> This also seems to weigh in Sternberg’s favor. Parody and criticism generally do not compete with the author’s own current or future work in the marketplace:

Copyright holders rarely write parodies of their own works, *see, e.g., Warner Bros.*,<sup>105</sup> . . . or write reviews of them, *see Harper & Row*,<sup>106</sup> . . . and are even less likely to write new analyses of their underlying data from the opposite political perspective, *see, e.g., Maxtone-Graham*[.]<sup>107</sup>

Parodies and, to a greater extent, critical reviews may impact sales by discouraging potential purchasers of the work, but this is not competition—it is the legitimate function of criticism.

While the list of factors is non-exclusive and the statute gives no specific formula for their application, three of the four factors, including the paramount fourth factor, favor Sternberg. Even if “The Only Fair Game” is otherwise an infringement on Niven’s copyright, it is likely to be protected as fair use.

#### 4. *An Additional Note on Parody, Fair Use, and the First Amendment*

Even works that are not protected by fair use may be protected under the First Amendment.<sup>108</sup> Section 107 is subject to change at the whim of Congress, but some uses protected under it, especially parody and criticism, are protected by the First Amendment’s guarantee of freedom of expression.<sup>109</sup> The First

103. *See Campbell*, 510 U.S. at 588; *Columbia Pictures Corp. v. Nat’l Broad. Co.*, 137 F. Supp. 348, 354 (S.D. Cal. 1955); *Berlin v. E. C. Publ’ns, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964).

104. 17 U.S.C. § 107 (2006); *see, e.g., Twin Peaks Prods., Inc.*, 996 F.2d at 1376-77 (“The fourth factor, market effect, is ‘undoubtedly the single most important element of fair use.’”) (quoting *Harper & Row Publishers*, 471 U.S. at 566).

105. *Warner Bros. v. Am. Broad. Cos., Inc.*, 720 F.2d 231, 242-43 (2d Cir. 1983).

106. *Harper & Row Publishers, Inc.*, 471 U.S. at 584.

107. *Maxtone-Graham v. Burchaell*, 803 F.2d 1253 (2d Cir. 1986); *Twin Peaks Prods, Inc.*, 996 F.2d at 1377. This is not to say that content owners never parody or spoof their own work; recent examples include the break-dancing Yoda Easter egg on the *Star Wars Episode III: Revenge of the Sith DVD* and the three “Super-Deformed Shorts” (esp. *School Time Shipping*) on the *Avatar: The Last Airbender, Book Two: Earth* boxed set DVD.

108. U.S. CONST. amend. I.

109. *Id.*

Amendment's protections are not necessarily coterminous with those of section 107; just as some material protected by section 107 is not constitutionally protected free expression, some constitutionally protected free expression lies outside the scope of section 107.

Sternberg seems to believe his work is protected as a parody:

**LEGAL DISCLAIMER**

Concurrent with the United States Supreme Court decision regarding *Campbell v. Acuff-Rose Music, Inc.* (1994) and the copyright laws of the United States, this is a work of parody. This work is posted freely without any request for remuneration [sic]; its only purpose is social commentary presented in an entertaining fashion.<sup>110</sup>

Whether it is actually a parody, and if so whether it is protected under *Campbell*, is not so clear.<sup>111</sup> *Campbell* involved a parody of Roy Orbison's intensely irritating 1964 song "Oh, Pretty Woman."<sup>112</sup> The song had been covered by several other musicians and served as the inspiration for the movie "Pretty Woman," starring Julia Roberts and Richard Gere.<sup>113</sup>

Luther Campbell, of the notorious early rap group 2 Live Crew, requested permission to perform a parody of the song; Acuff-Rose refused to give permission.<sup>114</sup> Despite the refusal, Campbell and 2 Live Crew recorded and distributed the parody, "Big Hairy Woman."<sup>115</sup> While relatively mild by comparison to some of 2 Live Crew's other works, the song could be considered shocking; the Supreme Court seemed to agree with the dissenting opinion of Judge Nelson in the appellate court that "Big Hairy Woman"

"was clearly intended to ridicule the white-bread original" and "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses."<sup>116</sup>

The Supreme Court agreed that the work was a parody and that whether the parody was successful, let alone in good taste, was irrelevant:

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110. Sternberg, *supra* note 76.

111. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

112. *Id.*

113. PRETTY WOMAN (Touchstone Pictures 1990).

114. *Campbell*, 510 U.S. at 572.

115. *Id.* at 572-73.

116. *Id.* at 582 (citing Nilsen, J., dissenting).

having found [the element of parody] we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use.<sup>117</sup>

By the *Campbell* court's somewhat lenient definition, "The Only Fair Game" is probably a parody, mocking the machismo of the kzinti. (Niven might respond that machismo is a human characteristic and that anyone who perceives it in the kzinti is anthropomorphizing.) Parodies are a large part of the world of fanfic. Some fit clearly within the traditional boundaries of parody, like the numerous parodies of popular F/SF movies written as screenplays.<sup>118</sup> These parodies poke fun at the flaws and inconsistencies of the originals, but serve to enhance rather than reduce fans' enjoyment of the original. As a literary matter, some are "real parody, inseparable from admiration,"<sup>119</sup> while others, less fond, "yield to the spirit of contempt which destroys parody."<sup>120</sup> Some works have inspired an anti-fandom devoted to heaping venom on the work; many parodies of the comic strip *For Better or For Worse* probably fall into this category.<sup>121</sup> The "Big Hairy Woman" parody probably falls into the second category. It's not entirely clear where "The Only Fair Game" falls. Both types of parody, however, are equally protected under *Campbell*: "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed."<sup>122</sup>

117. *Id.*

118. See, e.g., Cleolinda, *Memorable Movies in Fifteen Minutes Entries*, <http://www.livejournal.com/tools/memories.bml?user=cleolinda&keyword=Movies+in+Fifteen+Minutes&filter=all>; Evadne\_noel, *Memorable Breadbox Editions Entries*, [http://www.livejournal.com/tools/memories.bml?user=evadne\\_noel&keyword=Breadbox+Editions&filter=all](http://www.livejournal.com/tools/memories.bml?user=evadne_noel&keyword=Breadbox+Editions&filter=all); Mistful, *Memorable Entries*, <http://www.livejournal.com/tools/memories.bml?user=mistful>; Naill\_renfro, *Memorable Parody Entries*, [http://www.livejournal.com/tools/memories.bml?user=naill\\_renfro&keyword=parody&filter=all](http://www.livejournal.com/tools/memories.bml?user=naill_renfro&keyword=parody&filter=all); Molly J. Ringwraith, *Memorable Entries*, <http://www.livejournal.com/tools/memories.bml?user=mollyringwraith>; Molly J. Ringwraith, *Harry Potter and the Deathly Hallows, Condensed Parody*, <http://mollyringwraith.livejournal.com/66902.html> (all sites last visited Aug. 18, 2008); and the sadly-defunct *Jerry the Frog Productions*, available (via the Wayback Machine), at <http://web.archive.org/web/20061130171850/www.jerrythefrogproductions.com/WhatsNew.html>.

119. GILBERT KEITH CHESTERTON, *VARIED TYPES* 179 (Project Gutenberg ed., 2004) (1908), available at <http://infomotions.com/etexts/gutenberg/dirs/1/4/2/0/14203/14203.htm> (last visited Aug. 18, 2008).

120. *Id.*

121. See, e.g., beatonna, *Hark! A Vagrant, A Chilling Romance*, <http://beatonna.livejournal.com/54383.html>; Posting of Keogh to <http://www.comixfan.com/xfan/forums/showthread.php?p=1442950#post1442950> (Aug. 6, 2008) (*X-Parodies*); Posting of yellojkt to <http://livebythefoma.blogspot.com/2007/07/foobpocalypse-now.html> (July 8, 2007) (*Foobocalypse Now*) (all sites last visited Aug. 18, 2008).

122. *Campbell*, 510 U.S. at 583 (quoting *Yankee Publ'g Inc. v. News Am. Publ'g, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992)).

As for “The Only Fair Game,” Niven seems content to let the matter lie. Pursuing it further could arouse the wrath of fandom. Other fanfic parodists are probably also on fairly solid ground, as long as they take heed of *Campbell’s* warning that works that copy more than necessary for parodic effect, to such an extent that they become substitutes for the original, may not be protected:

The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely “supersede the objects” of the original.<sup>123</sup>

Similar reasoning, specifically invoking the First Amendment, applies to parody and other fanfic uses of protected marks. Even fanfic that, perhaps by reason of advertising on the website on which it is posted, constitutes a use in commerce may use otherwise protected marks as story elements:

[W]hen unauthorized use of another’s mark is part of a communicative message and not a source identifier, the First Amendment is implicated in opposition to the trademark right . . . [W]here the unauthorized use of a trademark is for expressive purposes of comedy, parody, allusion, criticism, news reporting, and commentary, the law requires a balancing of the rights of the trademark owner against the interests of free speech.<sup>124</sup>

The First Amendment interest of the fanfic author is thus balanced against the likelihood of confusion as to the source of the stories. Even without the disclaimers many fanfics contain, it seems highly unlikely that any readers will believe them to be created or authorized by the owners of the marks.<sup>125</sup>

### *B. Marion Zimmer Bradley Changes Her Mind*

The late Marion Zimmer Bradley (universally known in fandom as MZB) is perhaps best known as the author of *The Mists of Avalon*,<sup>126</sup> a feminist retelling of Arthurian legends, and its sequels. Among genre SF fans, though, she is known as the author of the Darkover series of novels. Like *Star Trek* or

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123. *Campbell*, 510 U.S. at 583 n.16 (1994).

124. *Yankee Publ’g, Inc.*, 809 F. Supp. at 276.

125. See generally, e.g., *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989); *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ’g Group, Inc.*, 886 F.2d 490 (2d Cir. 1989); *Yankee Publ’g, Inc.*, 809 F. Supp. at 277-79.

126. MARION ZIMMER BRADLEY, *THE MISTS OF AVALON* (1982).

Niven's Known Space series, the Darkover series involves multiple alien races in a distant future when travel between the stars is commonplace. Unlike the Known Space stories, almost all of the action takes place on a single planet, Darkover.

Even more so than Niven and Rowling, MZB was initially friendly to fanfic. In 1975 Darkover fans formed a fan group, The Friends of Darkover, which published Darkover fanfic in a letterzine and, starting in 1977, in a more formal fanzine, *Starstone*.<sup>127</sup> (Other Darkover fanzines included *Contes di Cottman IV* and *Moon Phases*.) MZB read the fanzine regularly and even published a few items in it.<sup>128</sup> In 1980 the first volume of Darkover fan fiction was commercially published, with MZB's approval. MZB wrote in the introduction, "I have always encouraged young writers to write in my world; I think it's fun. Besides, how else can I get to read Darkover stories without going to the trouble of writing them?"<sup>129</sup> The main goal and benefit, though, was not her own entertainment:

I am awed and humbled at the notion that the very concept of Darkover could encourage so many young women, previously inarticulate, to try their voices at creating new characters and new situations in Darkover. In the jargon of feminism, one could say that Darkover gave them a "safe space in which to try creativity." Surrounded by a world ready-made for them, they could concentrate on character and incident, and not need to wake up a whole world of their own.<sup>130</sup>

She poured disapproval on authors who sought to suppress fanfic set in the worlds they had created:

All the selfish exclusiveness of the Conan Doyle estate (which went so far as to demand that the late *Ellery Queen* anthology, *The Misadventures of Sherlock Holmes*, a very fine volume of Holmes pastiches, be withdrawn from sale and never reprinted, thus denying Holmes lovers a wonderful reading experience) has not stopped lovers of Sherlock from writing their own stories and secretly sharing them. Why should I deny myself the pleasure of seeing these young writers learning to do their thing by, for a little while, doing my thing with me?<sup>131</sup>

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127. Fabrice Rossi, *The History of Darkover Anthologies: The Friends of Darkover* (Apr. 21, 1999), <http://darkover.apiacoa.org/guide/short-stories/history.en.html>.

128. *Id.*; BRADLEY, *supra* note 126, at 7-8.

129. BRADLEY, *supra* note 126, at 7.

130. *Id.* at 12.

131. *Id.* at 14.

And she addressed the excuses given by these authors: she did not “feel threatened by stories not consistent with [her] personal vision of Darkover.”<sup>132</sup> Fanfic was as rewarding for the author as for the fans:

When I was a little kid, I was a great lover of “pretend” games, but after I was nine or ten, I could never get anyone to play them with me. . . . And now I have a lot of fans, and friends, who will come into my magic garden and play the old “pretend games” with me.<sup>133</sup>

She concluded with an invitation to fans to write further fanfic:

*Far, far away somewhere in the middle of the Galaxy, and about four thousand years from now, there is a world with a great red sun and four moons. Won't you come and play with me there?*<sup>134</sup>

Most of all, MZB did not see any need to worry about the possibility that fanfic might preclude her from writing certain stories herself:

Some critics have been disturbed by the possibility that I might exploit my dying fans, or steal their ideas, or use their work in my future novels. . . . Of course, I get ideas from my young fans, just as I give them ideas. But as for stealing their ideas—I have quite enough ideas of my own . . . . This is why I don't mind other writers writing about Darkover, and at the same time, I have no wish and no need to exploit their ideas. If I ever do make use of a fan's writing, it will be so altered and transmuted by its trip through my own personal dream-space that even the inventor would never recognize her idea, so alien would it be when I got through with it!<sup>135</sup>

*The Keeper's Price* was followed by several similar volumes throughout the 1980s and early 1990s. The end of this idyll was not far off, however. Exactly what happened is even less clear than in the Niven/Sternberg dispute, but the following is the general outline. In 1992 MZB was working on a novel, *Contraband*. A fan author, Jean Lamb, who had earlier published a short story in a commercially published Friends of Darkover collection,<sup>136</sup> published a Darkover fanfic, *Masks*, in *Moon Phases*. The various parties seem to agree that *Masks* was similar to *Contraband*, and that MZB had read or had the opportunity to read *Masks* while Lamb had not read or had the opportunity to read *Contraband*. In Lamb's words:

132. *Id.*

133. *Id.* It is interesting that MZB, like Niven, initially referred to her created world as a playground. See *supra* text accompanying note 74.

134. BRADLEY, *supra* note 126, at 15.

135. *Id.* at 13-14.

136. Jean Lamb, *Shut-In*, in RENUNCIATES OF DARKOVER (Marion Zimmer Bradley ed., 1991).

I received a letter offering me a sum and a dedication for all rights to the text. I attempted at that point to very politely negotiate a better deal. I was told that I had better take what I was offered, that much better authors than I had not been paid as much (we're talking a few hundred dollars here) and had gotten the same sort of "credit" (this was in the summer of 1992).

At that point I did not threaten any sort of suit whatsoever; in fact, a few months later I received a letter from Ms. Bradley's lawyer threatening me with a suit should I be a bit too frank about Ms. Bradley's um, writing methods, and who her current collaborators were at the time (at least that is how I took the lawyer's phrasing). Needless to say, I could not afford to defend myself if sued. Winning with the truth could have bankrupted me (and probably still could).<sup>137</sup>

A different perspective comes from Nina Boal, the editor of *Moon Phases*:

People, I was right in the middle of this and discussed this with the parties involved first hand. The following was acknowledged by both sides. Marion did offer Jean a special dedication and also \$500. Jean refused this, saying that she wanted a byline for the novel. Jean also became convinced (erroneously) that Marion intended to plagerize [sic] from her fan-written work about Danvan Hastur. Her actions made me positively sick. Jean was my good friend, but no more after what she did here and the unfounded accusations she made about Marion.<sup>138</sup>

In response to the incident, MZB backtracked on her earlier reasons for embracing fanfic:

While in the past I have allowed fans to 'play in my yard,' I was forced to stop that practice last summer when one of the fans wrote a story, using my world and my characters, that overlapped the setting I was using for my next *Darkover* novel. Since she had sent me a copy of her fanzine, and I had read it, my publisher will not publish my novel set during that time period, and I am now out several years' work, as well as the cost of inconvenience of having a lawyer deal with this matter.

Because this occurred just as I was starting to read for this year's *Darkover* anthology, that project was held up for more than a month while the lawyer drafted a release to accompany any submissions and a new contract, incorporating the release. I do not know at present if I shall be doing any more *Darkover* anthologies.

Let this be a warning to other authors who might be tempted to be similarly generous with their universes, I know now why Arthur Conan Doyle refused to allow anyone to write about Sherlock Holmes. I wanted to be more accommodating, but

137. Post by Jean Lamb, Re: The infamous Marion Zimmer Bradley case, Usenet Newsgroup rec.arts.sf.written (Mar. 19, 2001), <http://groups.google.com/group/rec.arts.sf.written/msg/80c1db3e5e35c1f9?dmode=source&output=gplain>.

138. Post by Nina Boal, mzb\_newsletter—The Marion Zimmer Bradley Newsletter, Re: Contraband (Mar. 19, 2001), [http://groups.yahoo.com/group/mzb\\_newsletter/message/209?l=1](http://groups.yahoo.com/group/mzb_newsletter/message/209?l=1), as reprinted in *Darkover Wiki*, Contraband (July 17, 2003), <http://darkover.wikia.com/wiki/Contraband>.



I don't like where it has gotten me. It's enough to make anyone into a misanthrope.<sup>139</sup>

*Contraband* was never published. Lamb submitted *Masks* to DAW Books, the publisher of the Friends of Darkover anthologies:

I can't use the book. A later submission to DAW of original work was returned in incredibly short time with a preprinted slip. (This may have had more to do with the quality of the work than the byline, I hasten to add, though I've never seen them work quite that fast before).<sup>140</sup>

MZB responded by issuing the "Darkover Non-Guidelines." In dramatic contrast to her previous easygoing policy, the Non-Guidelines prohibited all fanfic:

As things now stand, anyone writing a Darkover story, or using Mrs. Bradley's world or ANY of her characters, is violating her copyright. (Look up "derivative work" in the copyright law if you want the details.) She is NOT giving permission to do this. If she finds out that anyone is using her work in this fashion, she will turn the matter over to her lawyer. It's a shame, but the Darkover books are a large part of her livelihood, and she can't afford to have anyone compromise her copyright in them. Any Darkover stories sent to her are therefore returned or destroyed unread. If you see this notice and you have already written a Darkover story, please either destroy it or rewrite it so completely that it is not a derivative work of Mrs. Bradley's work.<sup>141</sup>

At least two of the statements in the first paragraph quoted above are untrue, or at least misleading. First, the decision of whether another work infringes copyright is not up to the author; it might have been more accurate to say, "may violate her copyright." Second, copyright does not prohibit the use of "ANY of her characters." Characters that are not sufficiently developed or delineated are not protected by copyright—and the place where that line is to be drawn is still unclear.<sup>142</sup> Even characters that might ordinarily be protected can make appearances in works unrelated to those from which they are derived without raising copyright concerns. Popeye the Sailor-Man can make a cameo

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139. Marion Zimmer Bradley, Letter to the Editor, *WRITER'S DIGEST*, Mar. 1993; *see also* Fan Works Inc., Fan Fiction Policies >> Bradley, Marion Zimmer, <http://www.fanworks.org/writersresource/?action=define&authorid=53&tool=fanpolicy> (last visited Sept. 9, 2008); *Darkover Non-Guidelines* (Apr. 21, 1999), <http://darkover.apiacoa.org/guide/short-stories/non-guidelines.en.html>.

140. Lamb, *supra* note 136.

141. *Darkover Non-Guidelines*, *supra* note 139.

142. *See, e.g.*, Warner Bros. Pictures, Inc. v. Columbia Broad. Sys., 216 F.2d 945 (9th Cir. 1954); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

appearance in Thomas Pynchon's *Mason & Dixon*, translating Hebrew for Dixon the surveyor.<sup>143</sup> Buffy Summers can fight out-of-copyright Dracula while making snide remarks about in-copyright Lestat.<sup>144</sup> The evil queen from Snow White can be merged with Jane Porter from the Tarzan series of stories and movies to serve as a major character in Donald Barthelme's *Snow White*.<sup>145</sup> (Snow White herself probably cannot be protected by copyright, even though Barthelme's character clearly derives at least as much from Disney's version—the last word of the book is “Heigh-ho”<sup>146</sup>—as from the Grimm version or earlier folktales.) Tarzan is protected as a character, or was at the time Barthelme wrote the novel.<sup>147</sup> Although “Jane,” unlike “Tarzan,” is a fairly common name, Jane Porter may be a sufficiently distinct character to be protected by copyright,<sup>148</sup> and Barthelme leaves no doubt (well, as little as possible, for him) which Jane he means: “Jane likes to swing from the lianas that dangle from the Meat Street trees . . . .”<sup>149</sup>

Fanfic writers and fanzine editors are rarely in a position to challenge authors, though, and the immediate effect of MZB's fanfic ban was to shut down the fanfic fanzines and to end the Friends of Darkover anthologies. Apparently three anthologies of stories already purchased were published, but the last came out in 1994.<sup>150</sup> By 1999 fan historian Patrice Rossi could report that the Friends of Darkover “has more or less stopped its activities.”<sup>151</sup> The fanfic ban had killed Darkover fandom. Although there are several Darkover reference sites on the web, the fanfic ban has prevented the more active online life that many other fandoms enjoy. MZB died in 1999. Darkover novels continue to be published, with MZB listed as first author, but Darkover has faded from the prominence it enjoyed in genre fiction in the 1970s and 1980s.

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143. THOMAS PYNCHON, *MASON & DIXON* 486 (1997). Popeye's translation of “Eyer asher Eyeh” from Exodus 3:14 as a barely-modified version of his trademark (!) line, “I yam what I yam,” is actually controversial, as another character hastens to point out.

144. *Buffy the Vampire Slayer: Buffy v. Dracula* (WB television broadcast Sept. 6, 2000).

145. DONALD BARTHELME, *SNOW WHITE* (1967).

146. Or is that two words? BARTHELME, *supra* note 145, at 181.

147. See *Burroughs v. Metro-Goldwyn-Mayer, Inc.*, 683 F.2d 610 (2d Cir. 1982); *Edgar Rice Burroughs, Inc. v. Manns Theatres, No. 76-3612*, 1976 WL 20994 (C.D. Cal. Dec. 20, 1976); see also Kurtz, *supra* note 49, at 451-67.

148. See *Edgar Rice Burroughs, Inc.*, 1976 WL 20994 at 22-23.

149. BARTHELME, *supra* note 145, at 38.

150. *SNOWS OF DARKOVER* (Marion Zimmer Bradley ed., 1980).

151. Rossi, *supra* note 127.

### C. *Harry Potter and the Unauthorized Lexicon*

Harry Potter is one of the world's most widely recognized fictional characters and the subject of numerous critical works, parodies, and works of fan fiction, formally published and otherwise.<sup>152</sup> Harry Potter fandom is one of the Big Fandoms—on a par with Star Trek, Lord of the Rings, and Star Wars fandom—and it has grown faster than the others, in large part because it came into being after the advent of the World Wide Web. Fans built thousands of websites with millions of pages, and in doing so built the global Harry Potter phenomenon. Most of these pages were small; some became enormous libraries of material, like Mugglenet, The Leaky Cauldron, Veritaserum, HPana, and the Harry Potter Lexicon. The Harry Potter Lexicon was, and is, the project of Steven Vander Ark. More of an encyclopedia than a dictionary, it contains entries on just about every character, place, and object mentioned in the Harry Potter novels and associated materials. In 2004 J.K. Rowling, Harry Potter's author, chose it as one of her favorite fan sites, writing:

This is such a great site that I have been known to sneak into an internet café while out writing and check a fact rather than go into a bookshop and buy a copy of Harry Potter (which is embarrassing). A website for the dangerously obsessive; my natural home.<sup>153</sup>

The text still appeared on Rowling's site in August 2008.

Like Niven, Rowling enjoyed a positive relationship with fandom and not only permitted, but encouraged fan fiction and other fan works. She actively engaged fandom and fanfic, at one point jokingly telling fans, "Oh you girls and Draco Malfoy! You must start to get past this."<sup>154</sup> Later, after announcing,

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152. And even law review articles. See, e.g., Aaron Schwabach, *Harry Potter and the Unforgivable Curses: Norm-formation, Inconsistency, and the Rule of Law in the Wizarding World*, 11 ROGER WILLIAMS U. L. REV. 309 (2006); Laura Spitz, *Wands Away (or Preaching to Infidels Who Wear Earplugs)*, 41 L. TEACHER (forthcoming 2009) (manuscript available on SSRN at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1014160](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1014160)); Benjamin H. Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. 1523 (2006); Paul R. Joseph & Lynn E. Wolf, *The Law In Harry Potter: A System Not Even a Muggle Could Love*, 34 U. TOL. L. REV. 193 (2003); William P. MacNeil, "Kidlit" as "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 L. & LITERATURE 545 (2002); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767 (2006); Jeff Thomas et al., *Harry Potter and the Law*, 12 TEXAS WESLEYAN L. REV. 427 (2005).

153. J.K. Rowling, Official Site Section: Fan Sites, [http://www.jkrowling.com/textonly/en/fansite\\_archive.cfm?year=2004](http://www.jkrowling.com/textonly/en/fansite_archive.cfm?year=2004) (last visited Aug. 19, 2008).

154. Accio Quote!, J.K. Rowling, Steven King, and John Irving, Benefit Reading at Radio City Music

to prolonged applause, that she had “always thought of Dumbledore as gay,”<sup>155</sup> she added, “If I’d known it would make you so happy, I would have announced it years ago! . . . Oh, my god, the fan fiction now, eh?”<sup>156</sup> This may show a misunderstanding of the nature of fan fiction, or at least of slash: if Dumbledore is gay in canon, Dumbledore slash loses the transgressive quality that may be one of slash’s essential components.<sup>157</sup> But setting that aside, it again shows Rowling’s continuing engagement with fan writers.

### *1. J.K. Rowling and the Commercially Published Fan Fiction*

While tolerant and even encouraging of amateur fanfic, Rowling and her publishers have had no tolerance for commercially published fan fiction. Rowling has said that she has read and enjoyed fanfic and has made no attempt to suppress it,<sup>158</sup> although Warner Brothers, which makes the Harry Potter movies, “is not always as kind”: “They have gone after people who have used Harry Potter on their web sites and aggressively fought for the rights to domains related to Harry Potter. This has shut down a few Harry Potter fan sites with some fan fiction.”<sup>159</sup> Despite these occasional excesses, though, “[t]here has been no real effort on the part of Warner Brothers to seek to put an end to Harry Potter fan fiction.”<sup>160</sup>

When movie copyrights are involved and an extra layer of administration is added between the author and the fans, tolerance tends to diminish. Thus Warner Brothers, the maker of the Harry Potter movies, has cracked down on fansites that Rowling herself would most likely have left undisturbed. As seems to be the norm in such matters, Warner Brothers’ enforcement efforts have been at times ludicrously ham-handed:

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Hall to Raise Money for Doctors without Borders and the Haven Foundation (Aug. 1, 2006), <http://www.accio-quote.org/articles/2006/0801-radiocityreading1partial.html> (last visited Aug. 19, 2008).

155. The Leaky Cauldron, J.K. Rowling at Carnegie Hall Reveals Dumbledore is Gay; Neville Marries Hannah Abbott, and Much More (Oct. 19, 2007), <http://the-leaky-cauldron.org/2007/10/20/j-k-rowling-at-carnegie-hall-reveals-dumbledore-is-gay-neville-marries-hannah-abbott-and-scores-more>.

156. *Id.*

157. See, e.g., Molly Ringle, *I Love the Smell of Fandom Rioting and Looting in the Morning*, Oct. 27, 2007, <http://lemonlye.livejournal.com/172557.html>; Katyal, *supra* note 11, at 508-09.

158. Fan Works Inc., Fan Fiction Policies >> Harry Potter: J.K. Rowling & Harry Potter!, <http://www.fanworks.org/writersresource/?tool=fanpolicy&action=define&authorid=108> (last visited Aug. 19, 2008).

159. *Id.*

160. *Id.*

[In December 2000] 15-year-old Claire Field received a letter from Warner Brothers' London legal department asking her to turn over the name [www.harrypotterguide.co.uk](http://www.harrypotterguide.co.uk). Like her dragon-defying idol, the British youth rebelled. She sent an e-mail message to a British tabloid, the *Mirror*, which ran a story about her. A U.K.-based online news site, the *Register*, picked up the story, which was soon posted on fan-related online newsgroups. Internet users from around world—youngsters and adults alike—are now urging Field to fight back.

"I've just read the news that the Evil Dark Arts experts a.k.a. Warner Brothers are trying to cast some dark charms and shut down this site. GOLLY! What total ROT. We have got to get some good charms and wand waving to seriously sort them out," wrote a fellow Harry Potter fan on Field's Web site.

Its legal rights notwithstanding, Warner Brothers' crackdown has enraged many of Harry Potter's loyal fans. Hundreds of fan-site creators in addition to Field have been sent letters. Christie Chang, a 15-year-old from Singapore, has received two letters from Warner Brothers' lawyers. One says that the fan site, to which she devotes at least an hour a day, violates copyright laws by using various Harry Potter images. The other letter from the studio's lawyers demands back the domain name she has registered, [www.harrypotternetwork.net](http://www.harrypotternetwork.net), and insists she promptly contact them in Beverly Hills, California.<sup>161</sup>

While such actions against noncommercial Harry Potter fandom seem to be anomalous, Rowling and the other Harry Potter stakeholders have suppressed commercially published and distributed fan fiction, mostly in non-English-speaking countries. In Russia, Dmitry Yemets has done well with Tanya Grotter, who "rides a double bass, sports a mole instead of a bolt of lightning, and attends the Tibidokhs School of Magic."<sup>162</sup> Yemets describes Tanya as "cultural competition" and "a sort of Russian answer to Harry Potter."<sup>163</sup> Rowling, apparently, describes her as copyright infringement: in April 2003 she succeeded in blocking the distribution of Tanya Grotter's adventures in the Netherlands.<sup>164</sup> Tanya Grotter remains in print in Russia,

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161. Stephanie Grunier, *Warner Bros. Claims Harry Potter Sites*, ZDNET, Dec. 21, 2000, [http://news.zdnet.com/2100-9595\\_22-96323.html](http://news.zdnet.com/2100-9595_22-96323.html); see also Ranon, *supra* note 11, at 421 n.1 and accompanying text. The site at <http://www.harrypotterguide.co.uk> is still up, with a disclaimer: "This site is an unofficial Harry Potter site, and therefore should only be entered by people who fully understand that the site holds no connection to J.K. Rowling, Bloomsbury, Scholastics or Warner Bros. It is however meant as an educational experience for all ages, and is non-profit." Claire Field, now 23, is still listed as the administrator. Claire Field, *About the Webmistress*, <http://www.harrypotterguide.co.uk> (last visited Sept. 14, 2008). There is no site at <http://www.harrypotternetwork.net>. Christie Chang is apparently the administrator of The Harry Potter Network. Christie Chang, *The Harry Potter Network*, <http://www.thehpn.com> (last visited Sept. 14, 2008).

162. Tim Wu, *Harry Potter and the International Order of Copyright: Should Tanya Grotter and the Magic Double Bass Be Banned?*, June 27, 2003, <http://www.slate.com/id/2084960/>; see also Dennis S. Karjala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17 (2006).

163. *Id.*

164. Wu, *supra* note 162; Rowling v. Uitgeverij Byblos BV, 2003 WL 21729296, [2003] E.C.D.R.

where the thirteen volumes of her adventures have sold three million copies.<sup>165</sup> The interest in the Tanya Grotter series outside of Russia seems to be generated by Rowling's attempt to suppress it and the subsequent notoriety; Yemets himself has "described the Tanya Grotter series as a purely Russian phenomenon, dependent on the language and culture, and commented that he would not place much faith in Tanya living a full life if she were brought to the playing field of Europe or America."<sup>166</sup>

Yemets tried, unsuccessfully, to defend the Tanya Grotter series as parody in the Netherlands lawsuit.<sup>167</sup> The trial court found that *Tanya Grotter and the Magic Double Bass* was "an adaptation of [Rowling's] book and was in competition with, rather than a parody of" it.<sup>168</sup> The appellate court agreed, adding that Yemets' book was not a parody, and "even if . . . viewed as a polemic, the writing of a fairy tale book was not the most appropriate manner to 'quote' from another works as part of such a polemic[.]"<sup>169</sup>

It may be that the Tanya Grotter books are not parodies; what they seem to be is inverse Mary Sue fanfic. "Mary Sue" refers to a subcategory of fanfic that places the author, or a character closely based on the author, into a fictional world. Yemets has done the opposite: he has taken Harry Potter, or a character very similar to him, and brought him from England to Russia. Because Harry and Tanya are creatures of text, this has meant a textual transplant: Harry has been removed from the grand narrative of John Donne and T.S. Eliot<sup>170</sup> and set down, after a quick change of gender and hair color, in the grand narrative of Pushkin and Baba Yaga. For example, the magic school Tanya attends is located on the island of Buyan, instantly recognizable to Russian readers, even very young ones, from Pushkin's poem *The Tale of Tsar Saltan, of his Son the Renowned and Mighty Bogatyr Prince Gvidon Saltanovich, and of the Beautiful Princess-Swan*<sup>171</sup> and from Rimsky-

23 (RB [Amsterdam] Arrondissementrechtbank, Apr. 3, 2003); *aff'd*, 2003 WL 23192402, [2004] E.C.D.R. 7 (Hof [Amsterdam], Nov. 6, 2003).

165. See generally Тая Гроттер, *Новости*, <http://www.grotter.ru/> (last visited Sept. 2, 2008).

166. Wikipedia, the Free Encyclopedia, Tanya Grotter, [http://en.wikipedia.org/wiki/Tanya\\_Grotter#cite\\_note-7](http://en.wikipedia.org/wiki/Tanya_Grotter#cite_note-7) (last visited Sept. 2, 2008) (citing The Russian Tanya Grotter—an answer to Harry Potter, Kiev Telegraph online edition, Feb. 10-16, 2006 (no longer available online)).

167. See, e.g., JSBlog, *Tanya Grotter*, July 21, 2007, <http://segalbooks.blogspot.com/2007/07/tanya-grotter.html>; *Rowling v. Uitgeverij Byblos BV*, 2003 WL 21729296.

168. *Rowling v. Uitgeverij Byblos BV*, 2003 WL 21729296 (english-language summary).

169. *Rowling v. Uitgeverij Byblos BV*, 2003 WL 23192402 (english-language summary of appeal).

170. See Schwabach, *supra* note 152, at 345-46.

171. ALEXANDER PUSHKIN, *СКАЗКА О ЦАРЕ САЛТАНЕ* (1831), available at <http://www.lib.ru/LITRA/PUSHKIN/saltan.txt>; see also ALEXANDER PUSHKIN, *THE TALE OF TSAR SALTAN* (Louis Zellikoff trans., Moscow: Progress Publishers 1970), available at <http://home.freeuk.com/russica4/books/salt/saltan.html>.

Korsakov's opera *The Tale of Tsar Saltan*.<sup>172</sup> (In yet another example of the inevitable derivative nature of all works in an ongoing literary tradition, Pushkin's poem in turn is based on a traditional Russian folk tale.)

The Mary Sue subgenre of fanfic is accorded little respect among fans, but has its defenders, who see in it "the modern incarnation of an old and often celebrated phenomenon—retelling a canonical story to better represent oneself."<sup>173</sup> If Mary Sue can empower individual fanfic writers or the groups to which they belong,<sup>174</sup> Yemets may be empowering Russia, and through his retelling both protecting Russia's literary tradition and making a foreign character more accessible to a Russian audience.

In addition, Yemets is achieving what early observers saw as one of the main benefits of fanfic: jump-starting his own career as a writer. And Yemets, who began with Tanya Grotter, is now focusing his attention on two new series—the Methodius Buslaev and Hooligan adventures.<sup>175</sup> Methodius Buslaev appears in the Tanya Grotter stories, but he is entirely Yemets' creation. In his own adventures Buslaev's world seems less Potteresque. Interestingly, Yemets explicitly encourages fanfic on the Buslaev website, urging readers to "write their own version of events" and answer the question "what happens after the book ends?"<sup>176</sup> At least one volume of these fan stories has been commercially published.<sup>177</sup>

Although Chander and Sunder see noncommercial Mary Sue fanfic as fair use,<sup>178</sup> the Tanya Grotter novels are likely to fail the fourth prong of the Section 107 test. In July 2006, the best-selling children's book in Russia was

172. *Id.* (1900 opera, perhaps best known to most Americans for "Flight of the Bumblebee").

173. Anupam Chander & Madhavi Sunder, *Everyone's a Superhero: A Cultural Theory of "Mary Sue" Fan Fiction as Fair Use*, 95 CAL. L. REV. 597, 598 (2007); see also, e.g., Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007).

174. *Id.* at 598.

175. See generally Мифодий Буслаев, <http://www.buslaev.ru/> (last visited Sept. 2, 2008) (Methodius Buslaev official website).

176. Фанаты Дмитрия Емца написали продолжение его книги, Арг. 30, 2008, <http://www.buslaev.ru/news/2305/> ("Что происходит с героями, когда заканчивается книга? Что делает читатель, перевернув последнюю страницу? Читатель ждет продолжения любимого сериала и . . . пишет свою версию событий! И тогда герои начинают жить собственной жизнью . . .").

177. МИРЫ ТАНИ ГРОТТЕР И МЕФОДИЯ БУСЛАЕВА, ФАНАТЫ ДМИТРИЯ ЕМЦА НАПИСАЛИ ПРОДОЛЖЕНИЕ ЕГО КНИГИ, Арг. 30, 2008, <http://www.buslaev.ru/news/2305/> (last visited Sept. 2, 2008) (title translates to "Peace Tanya Grotter and Methodius Buslaeva"). A note on translations: Any translations from Portuguese, especially any errors, are my own. Any translations from Chinese are mine, too, with the indispensable help of Zhou Qienyuan—that is to say, the errors are mine and the parts that are correct are Dr. Zhou's. Any translations from Russian are by way of Google Language Tools, and I'm generously willing to give Google credit for the errors as well.

178. Chander & Sunder, *supra* note 173.

*Таня Гроттер и перстень с жемчужиной* ["Tanya Grotter and the Pearl Ring"], the eleventh in the series.<sup>179</sup> *Harry Potter and the Half-Blood Prince*, published in Russian in December 2005,<sup>180</sup> was second.<sup>181</sup> It is hard to tell whether Tanya Grotter was actually displacing Harry Potter sales, or whether there was sufficient elasticity of demand for fantasy that all potential buyers of one work would just as happily buy both. On the same list, the translation of the fifth Harry Potter book, *Harry Potter and the Order of the Phoenix*, ranked sixth, while the fifth of Yemets' Methodius Buslaev adventures, *Методий Буслаев: Месть валькирий* ["Methodius Buslaev: Revenge of the Valkyries"], ranked tenth.<sup>182</sup>

Yemets is far from the only author to seek to bring Harry Potter into his own country's literary tradition. In neighboring Belarus, a Harry Potter clone—save that he is a technology—user in a world where most people use magic—rides a motorcycle and wields a grenade launcher in *Porri Gatter and the Stone Philosopher* and its sequels.<sup>183</sup> In India, Harry Potter's broomstick takes him flying across Calcutta to meet characters from Bengali literature, Indian history, and cinema—or did, until he was grounded by a copyright lawsuit.<sup>184</sup> While the character Harry Potter is protected by copyright and trademark, Warner Brothers, owner of the copyright in the Harry Potter movies, has even sought to prevent the use of sound-alike names in unrelated works, suing to enjoin the release of a movie with the title *Hari Puttar—A Comedy of Terrors* about "a 10-year-old boy who moves to England with his

179. Elena Kitayeva, *Наши дети - это невыгодно*, BUSINESS PETERSBURG ONLINE, Sept. 13, 2006, <http://www.dpgazeta.ru/article/104243>.

180. News.RIN.ru, *Russian version of "Harry Potter and Half-Blood Prince" appeared in stores*, <http://news.rin.ru/eng/news///3230/> (last visited Sept. 2, 2008).

181. Kitayeva, *supra* note 179, *contra* Wu, *supra* note 162:

[T]he argument for letting Potter crush his international competition is quite weak . . . [A]s trade economists will tell you, trade often works when countries imitate and improve the inventions of others . . . There is, in short, a secondary Potter market. Isn't this the international trading system at its best?

Moreover, the writers of secondary Potters are probably better at creating versions of Potter suited to local conditions . . . Local writers do things to Harry that Rowling can't, like introducing him to local literary figures and putting him in local wars. It may be good and it may be bad, but it's a market failure to prevent it.

182. Kitayeva, *supra* note 179.

183. ПОРРИ ГАТТЕР И КАМЕННЫЙ ФИЛОСОФ [PORRI GATTER AND THE STONE PHILOSOPHER] (Vremnya 2002); ПОРРИ ГАТТЕР: ЛИЧНОЕ ДЕЛО МЕРГИОНЫ [PORRI GATTER: MERLIONIY'S PERSONAL FILE] (Vremnya 2003); ПОРРИ ГАТТЕР: 9 ПОДВИГОВ СЕНА АЕСЛИ [PORRI GATTER: 9 FEATS OF HAY AESLI] (Vremnya 2004); *see generally* *Порри Гаттер*, <http://www.gatter.ru/main.asp>; *see also* Wu, *supra* note 162, *and* Masterliness: Pori Gatter Porridge, <http://www.masterliness.com/a/Porri.Gatter.htm> (last visited Sept. 8, 2008).

184. Chander & Sunder, *supra* note 173, at 610-11 nn.86, 90.



parents and becomes embroiled in a battle over a secret microchip.”<sup>185</sup> While this sort of idem sonans argument might make a certain amount of sense with Tanya Grotter, which was clearly intended as an imitation of Harry Potter, it seems a bit farfetched with a story that doesn’t involve magic and a wizarding school; Harry Potter, after all, is a fairly ordinary English name.<sup>186</sup>

In China, Harry’s unauthorized adventures have taken him through Chinese literature, into an outer space filled with magical fairylands, and, curiously, into the world of Tolkien’s *The Hobbit*.<sup>187</sup> Chinese students have studied at Hogwarts, no doubt on a Mary Sue scholarship, in *Harry Potter and the Chinese Overseas Students at the Hogwarts School of Witchcraft and Wizardry*.<sup>188</sup> Some of these are low-grade attempts to cash in on the popularity of Harry Potter; the hobbit adventure, *Hali Bote yu Bao Zulong*, seems to be one of these.<sup>189</sup> Others are fanfic in the truest sense, like *Harry Potter and the Showdown*:

One . . . writer is a manager at a Shanghai textile factory named Li Jingsheng. “I bought Harry Potter 1 through 6 for my son a couple of years ago, and when he finished reading them, he kept asking me to tell him what happens next,” he explained. “We couldn’t wait, so I began making up my own story and in May last year, I typed it up on my computer. I had to get up early and go to bed late to write this novel, usually spending one hour, from 6 to 7 in the morning and 10 to 11 in the evening to write it.”

The result was “Harry Potter and the Showdown,” a 250,000-word novel, the final version of which he placed recently on Web sites, followed by a notice saying he was looking for publishers. The book quickly logged 150,000 readers on a popular Chinese site, Baidu.com’s Harry Potter fan Web page.

“This is fantastic,” Gu Guaiguai, an admiring reader, wrote online about “Showdown.” “I wonder if Rowling would bother to continue to write if she had read it.”<sup>190</sup>

185. Warner ‘sues over Puttar movie,’ BBC NEWS, Aug. 25, 2008, <http://news.bbc.co.uk/2/hi/entertainment/7580941.stm>; see also Hari Puttar Official Website, <http://www.hariputtartheilm.com/index.html>; Ramola Talwar Badam, *Bollywood’s ‘Hari Puttar’ wins ‘Harry Potter’ suit*, ASSOCIATED PRESS, Sept. 23, 2008, available at <http://www.iht.com/articles/ap/2008/09/23/asia/AS-India-Harry-Potter.php>.

186. Or at least it used to be. It seems unlikely that many parents with the surname Potter will be naming their sons “Harry” for the next century or so. Petunia Dursley thinks it’s common in the British, as well as American, sense of the word: “[n]asty, common name, if you ask me.” J.K. ROWLING, *HARRY POTTER AND THE SORCERER’S STONE* 7 (1997).

187. See generally Naill Renfro, *Pirate Naill Reads*, <http://naill-renfro.livejournal.com/2074.html> (last visited Sept. 2, 2008).

188. Chris Walters, *Chinese Fake Harry Potter Is Awesome; Also A Dragon*, CONSUMERIST, Aug. 11, 2007, <http://consumerist.com/consumer/fakes/chinese-fake-harry-potter-is-awesome-also-a-dragon-288542.php>.

189. Renfro, *supra* note 187.

190. Howard W. French, *Chinese Market Awash in Fake Potter Books*, N.Y. TIMES, Aug. 1, 2007, available at <http://www.nytimes.com/2007/08/01/world/asia/01china.html?pagewanted=2&ei=>

While *Showdown* is probably a better read than, say, *Bao Zulong*,<sup>191</sup> it was not written for profit—nonetheless, it has been sold in hard-copy form, without the consent or even knowledge of the author, Mr. Li.<sup>192</sup> This double piracy is, at least potentially, an infringement on both Rowling's copyright in the Harry Potter character and Li's copyright in the original elements of his work.

In general, the Harry Potter copyright machine has been tolerant of fanfic and parody, even commercially published parody such as the Belarussian adventures of Porri Gatter.<sup>193</sup> Commercially published parodies have also been tolerated in the Czech Republic,<sup>194</sup> France,<sup>195</sup> Hungary,<sup>196</sup> Indonesia,<sup>197</sup> and throughout the English-speaking world,<sup>198</sup> even though the fair use and First Amendment concerns underlying the U.S. Supreme Court's protection of parody in *Campbell* may have no counterparts in some countries. Works which are merely new adventures of Harry Potter, such as the Chinese and Indian examples discussed above, or that achieve substantial commercial success with

5087&em&enF. For an English-language equivalent, see Cassandra Claire's novel-length fanfic, *Draco Dormiens*, and its sequels. The novels have been taken offline by their author following a fandom dispute too convoluted and arcane to describe here, but are still widely available. See, e.g., *The Draco Trilogy*, <http://web.archive.org/web/20061016094249/http://www.heidi8.com/dt/> (last visited Sept. 15, 2008). Ms. Claire has gone on to become the author (as "Cassandra Clare") of the *Mortal Instruments* fantasy trilogy.

191. See *Harry Potter and the Showdown*, N.Y. TIMES, Aug. 10, 2007, available at <http://www.nytimes.com/2007/08/10/opinion/10potter8.html>.

192. French, *supra* note 190.

193. See *supra* note 184 and accompanying text; see also Kevin O'Flynn, *Potter Spawns Parody Part II*, ST. PETERSBURG TIMES (Russia), Nov. 29, 2002, available at [http://www.sptimes.ru/index.php?action\\_id=2&story\\_id=8705](http://www.sptimes.ru/index.php?action_id=2&story_id=8705) ("Natalya Dolgova of Rosmen, the Russian publishers of Harry Potter, said she had read portions of the Porri Gatter book and had no plans to sue. 'It's a parody,' she said.>").

194. See PETER JOLIN, *HARRY POUTER AND PHIL O'DENDRON'S STONE: PARODY OF HARRY POTTER AND THE PHILOSOPHER'S STONE, SOMEWHERE ON THE EDGE OF GOOD TASTE* (2005), and its sequels. The English-language version of the first book is notable for the intense hostility its spam e-mail marketing campaign aroused among English-speaking fans. See, e.g., [http://www.amazon.com/Harry-Pouter-Phil-Odendrons-Stone/dp/8086947033/ref=sr\\_1\\_1?ie=UTF8&s=books&qid=1220896574&sr=1-1](http://www.amazon.com/Harry-Pouter-Phil-Odendrons-Stone/dp/8086947033/ref=sr_1_1?ie=UTF8&s=books&qid=1220896574&sr=1-1) (last visited Sept. 8, 2008).

195. See PIERRE VEYS, *HARRY COVER: L'ENSORCELANTE PARODIE* (2005); PIERRE VEYS, *HARRY COVER: LES MANGEURS D'ANGLAIS* (2007) (graphic novels).

196. See K.B. ROTTRING: *HERI KÓKLER ÉS AZ EPEKÖVE* (2005), and its many sequels, available at <http://www.colors-computer.hu/~herikokler/index.htm>.

197. See HAPPY PORTER: *PENYUSUP DI SEKOLAH SIHIR HOMEWORK* (2007), available at <http://www.bukukita.com/infodetailbuku.php?idBook=5259> (last visited Sept. 8, 2008).

198. Far too many to list, but see, e.g., Michael Gerber, *Barry Trotter and the Unauthorized Parody* (2001), and its sequels. The first in the series was originally published in the U.S. as *Barry Trotter and the Shameless Parody* (2001) (The change of title from the U.K. to the U.S. edition is itself a joke, playing on the "translation" of the original U.K. title of the first book, *Harry Potter and the Philosopher's Stone*, to *Harry Potter and the Sorcerer's Stone* for the U.S. market.).

a character based on Harry Potter—Tanya Grotter—have not been tolerated. Alternatively, commercially published works in certain large markets—China, India, and Russia—may inspire a stronger reaction because these countries are perceived, often incorrectly, as more prone to copyright violation.<sup>199</sup> India has been a particular target: in addition to the lawsuits against Harry’s Bengali adventures<sup>200</sup> and his unrelated sound-alike Hari Puttar,<sup>201</sup> the Potter industry even sued the organizers of a Durga Puja festival in Kolkata for building a large papier-mâché castle intended to represent Hogwarts.<sup>202</sup>

## 2. *The HP Lexicon Takes One Step Too Far*

The HP Lexicon, praised by Rowling, eventually went beyond what she was willing to allow: in 2007 the site’s author, Steven Vander Ark, and RDR Books, a small publisher in Muskegon, Michigan, agreed to publish much of the information in the HP Lexicon in book form.<sup>203</sup> Rowling and her publishers sued to stop publication of the book. Although Rowling had not written a guide to her own work, she claimed that “[s]he had been planning to write her own definitive encyclopaedia, the proceeds of which she had intended to donate to charity.”<sup>204</sup> At a dramatic trial Vander Ark ended up sobbing on the witness stand, and the judge suggested that the case should never have been brought to trial:

Judge Patterson . . . reminded the parties that in “Bleak House,” the character Miss Flite faithfully attends every day of the trial and finally dies in her little attic. “A very sad story,” Judge Patterson said. “Litigation isn’t always the best way to solve things.”<sup>205</sup>

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199. See generally Aaron Schwabach, *Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere*, 2 J. INT’L MEDIA & ENT. L. 65 (2007).

200. See *supra* note 185 and accompanying text.

201. See *supra* note 186 and accompanying text.

202. *India court rejects Harry Potter author’s claim*, AFP, Oct. 12, 2007, [http://afp.google.com/article/ALeqM5hZhGr-qjWfYdFig\\_jagNfYzU-l8w](http://afp.google.com/article/ALeqM5hZhGr-qjWfYdFig_jagNfYzU-l8w).

203. See Tim Wu, *J.K. Rowling’s Dark Mark: Why She Should Lose Her Copyright Lawsuit against the Harry Potter Lexicon*, SLATE, Jan. 10, 2008, <http://www.slate.com/id/2181776>; RDR Books, *Harry Potter Lexicon Update*, <http://www.rdrbooks.com/books/lexicon.html>.

204. *Rowling Wins Book Copyright Claim*, BBC NEWS, Sept. 8, 2008, <http://news.bbc.co.uk/2/hi/entertainment/7605142.stm>.

205. Anemona Hartocollis, *Trial Over Potter Lexicon Ends With an Olive Branch*, N.Y. TIMES, Apr. 17, 2008, available at [http://www.nytimes.com/2008/04/17/nyregion/17potter.html?\\_r=1&scp=5&sq=rowling&st=nyt&oref=slogin](http://www.nytimes.com/2008/04/17/nyregion/17potter.html?_r=1&scp=5&sq=rowling&st=nyt&oref=slogin).

At least one observer saw a parallel to the abusive proceedings of the Ministry of Magic:

An expert witness for the plaintiffs, Jeri Johnson, an American expatriate who is a senior tutor at Oxford University, seemed to play the role of Dolores Umbridge, the Ministry of Magic's apparatchik at Hogwarts, as she testified. She dripped contempt as she referred to Mr. Vander Ark's work as "the so-called lexicon." She said she found Mr. Vander Ark's commentary in the book to be "weak waggishness."<sup>206</sup>

Rowling herself admitted that she did not think the HP Lexicon would displace sales of the Potter novels<sup>207</sup> and said that she was not sure she had "the will or the heart" to write her own guide.<sup>208</sup> Also, she stated that she was motivated not by economic factors but by "outrage."<sup>209</sup> Nonetheless, the court enjoined publication of Vander Ark's book.<sup>210</sup>

Although the injunction may have been bad news for Vander Ark and RDR, it was not necessarily bad news for fandom. Judge Patterson's opinion was at best lukewarm toward Rowling's arguments; he observed that "[i]ssuing an injunction in this case both benefits and harms the public interest."<sup>211</sup> Perhaps most importantly, the court found that the Lexicon was not a derivative work.<sup>212</sup> The Lexicon failed because it copied Rowling's text extensively in a way that was not a fair use of Rowling's material. Even so, some of the Section 107 factors weighed in Vander Ark's and RDR's favor. The first factor, purpose and character of the use, weighed in the defendants'

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206. Hartocollis, *supra* note 205. The author may have been thinking of a parallel to the hearing of Mary Cattermole before Dolores Umbridge. See J.K. ROWLING, *HARRY POTTER AND THE DEATHLY HALLOWS* 259-61 (Scholastic Books 2007). See generally Schwabach, *supra* note 152; Thomas et al., *supra* note 152; Joseph & Wolf, *supra* note 152 for a discussion on the flaws in the Ministry of Magic's legal procedures.

207. See Hartocollis, *supra* note 205 ("Can you imagine anyone reading this lexicon for entertainment value?" the Judge asked. "Honestly, your Honor, no," Ms. Rowling replied.).

208. *Rowling Wins Book Copyright Claim*, *supra* note 204.

209. Hartocollis, *supra* note 205.

210. Warner Bros. Entm't v. RDR Books, No. 07 Civ. 9667 (RPP), 2008 U.S. Dist. LEXIS 67771, at \*111 (S.D.N.Y. Sept. 8, 2008). Many of the documents relating to the case are also collected in Robert S. Want, *Harry Potter and the Order of the Court: The J.K. Rowling Copyright Case and the Question of Fair Use* (2008).

211. *Id.* at \*108.

212. *Id.* at \*64-66 (citing *Ty, Inc. v. Publ'ns Int'l*, 292 F.3d 512, 521 (7th Cir. 2002) (concluding that a collector's guide to Beanie Babies was not a derivative work); *Castle Rock Entm't v. Carol Publ'g Group*, 150 F.3d 132, 137 (2d Cir. 1998) (finding that a Seinfeld trivia book was derivative); *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1373 (2d Cir. 1993) (stating that a guide to Twin Peaks television series that set out detailed plot descriptions of the first eight episodes was derivative).

favor because the use was transformative<sup>213</sup>—that is, it altered the “expression, meaning, or message” of the original.<sup>214</sup> The Lexicon is a reference work; the seven Harry Potter novels tell a story. The use of material from the two School Books<sup>215</sup> presented a bit more of a problem because they are partly reference works themselves.<sup>216</sup> However, “the Lexicon’s use is slightly transformative in that it adds a productive purpose to the original material by synthesizing it within a complete reference guide that refers readers to where information can be found in a diversity of sources.”<sup>217</sup> The best evidence of the transformative nature of the Lexicon is that it was widely relied on as a reference source, even by Warner Brothers, Electronic Arts (the makers of Harry Potter video games), and Rowling herself.<sup>218</sup> This was undercut only slightly by the defendants’ desire to make a profit by providing the first comprehensive Harry Potter reference guide on the market.<sup>219</sup>

The second factor, the nature of the underlying work, favored the plaintiffs, as will always be the case with complex literary worlds: “In creating the Harry Potter novels and the companion books, Rowling has given life to a wholly original universe of people, creatures, places, and things . . . Such highly imaginative and creative fictional works are close to the core of copyright protection, particularly where the character of the secondary work is not entirely transformative.”<sup>220</sup>

The third factor, the amount and substantiality of the allegedly infringing use, was somewhat more difficult to assess. The court agreed with the defendants that “[t]o fulfill its purpose as a reference guide to the Harry Potter works, it is reasonably necessary for the Lexicon to make considerable use of

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213. *Warner Bros. Entm’t*, 2008 U.S. Dist. LEXIS 67771, at \*72.

214. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

215. The School Books, referred to in the opinion as the “companion books,” are two books used by Harry at school, with annotations in the margins by Harry and his friends. They are more in the nature of reference works than stories; they do not advance the plot or develop the characters significantly, but they do provide additional depth and illumination. *See* J.K. ROWLING, *FANTASTIC BEASTS & WHERE TO FIND THEM* (2001) (A bestiary describing many species of magical creatures and beings, some very important to the stories and others that do not even appear, that provides some insight into the tension between magical humans, non-humans, and Muggles); J.K. ROWLING, *QUIDDITCH THROUGH THE AGES* (2001) (A history of Quidditch that provides incidental glimpses of the Ministry of Magic and wizarding communities in other countries).

216. *Warner Bros. Entm’t*, 2008 U.S. Dist. LEXIS 67771, at \*73.

217. *Id.* at \*74.

218. *Id.* at \*74-75.

219. *Id.* at \*84-85.

220. *Id.* at \*95-96 (citing *Castle Rock Entm’t v. Carol Publ’g Group*, 150 F.3d 132, 144 (2d Cir. 1998); *Twin Peaks Prods., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1376 (2d Cir. 1993); *Paramount Pictures Corp. v. Carol Publ’g Group*, 11 F. Supp. 2d 329, 336 (S.D.N.Y. 1998)).

the original works.”<sup>221</sup> However, the Lexicon engaged in more verbatim copying of Rowling’s exact turns of phrase than was strictly necessary for description: “Verbatim copying of this nature demonstrates Vander Ark’s lack of restraint due to an enthusiastic admiration of Rowling’s artistic expression, or perhaps haste and laziness as Rowling suggested[.]”<sup>222</sup>

The fourth and most important<sup>223</sup> factor, effect on the potential market for or value of the underlying work, seemed to weigh slightly in favor of the plaintiffs, largely because of the School Books. The fact that Rowling might plan to publish her own encyclopedia was irrelevant because “the market for reference guides to the Harry Potter works is not exclusively hers to exploit or license, no matter the commercial success attributable to the popularity of the original works . . . . The market for reference guides does not become derivative simply because the copyright holder seeks to produce or license one.”<sup>224</sup> With regard to the seven novels,

there is no plausible basis to conclude that publication of the Lexicon would impair sales of the Harry Potter novels. Plaintiffs’ expert Suzanne Murphy, vice president and publisher of trade publishing and marketing at Scholastic, testified that in her opinion a child who read the Lexicon would be discouraged from reading the Harry Potter series because the Lexicon discloses key plot points and does not contain “spoiler alerts.” (Tr. (Murphy) at 409:12-411:7.) Children may be an elusive market for book publishers, but it is hard to believe that a child, having read the Lexicon, would lose interest in reading (and thus his or her parents’ interest in purchasing) the Harry Potter series. Because the Lexicon uses the Harry Potter series for a transformative purpose (though inconsistently), reading the Lexicon cannot serve as a substitute for reading the original novels; they are enjoyed for different purposes. The Lexicon is thus unlikely to serve as a market substitute for the Harry Potter series and cause market harm.<sup>225</sup>

With regard to the two School Books, the picture was somewhat different:

On the other hand, publication of the Lexicon could harm sales of Rowling’s two companion books. Unless they sought to enjoy the companion books for their entertainment value alone, consumers who purchased the Lexicon would have scant incentive to purchase either of Rowling’s companion books, as the information contained in these short works has been incorporated into the Lexicon almost wholesale. (Tr. (Murphy) at 419:10-19; id. (Rowling) at 104:2-11.) Because the

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221. *Warner Bros. Entm’t*, 2008 U.S. Dist. LEXIS 67771, at \*88.

222. *Id.* at \*92.

223. *Twin Peaks Prods., Inc.*, 996 F.2d at 1377 (“The fourth factor, market effect, is ‘undoubtedly the single most important element of fair use.’”) (quoting *Harper & Row, Publ’rs v. Nation Enter.*, 471 U.S. 539, 566 (1985)).

224. *Warner Bros. Entm’t*, 2008 U.S. Dist. LEXIS 67771, at \*98.

225. *Id.* at \*100.

Lexicon's use of the companion books is only marginally transformative, the Lexicon is likely to supplant the market for the companion books.<sup>226</sup>

The court also raised the possibility that the verbatim reproduction of the songs and poems in the novels could "impair the market for derivative works that Rowling is entitled or likely to license."<sup>227</sup>

On balance, the four statutory factors weighed against (though not, apparently, heavily against) a finding of fair use.<sup>228</sup> However, the opinion left plenty of room for RDR and Vander Ark to redesign the Lexicon around it, and they have done so. A revised Lexicon was scheduled for release on January 12, 2009, with the apparent consent of Rowling and Warner Brothers.<sup>229</sup> For fanfic authors generally, the opinion also provides reassurance. Although it remains to be seen what, if anything, will happen on appeal, the case finally provides clear guidance, in a fandom context, for what fans can and cannot do.

#### IV. CONCLUSION: THE THREE CONCERNS AND THEIR MEANING FOR FANFIC AUTHORS

As we have seen, three concerns motivate attempts to suppress fanfic. The first, Niven's concern, is about misuse or misrepresentation of the story elements created by the author. Authors may feel quite strongly about this, but under U.S. copyright law, at least, it is a problem without a remedy. Niven has sought to address the problem while continuing to engage fandom by exerting some measure of control over fanfic through an approved, commercially published series, in which Niven publishes stories about the kzinti by unknown as well as commercially established writers.<sup>230</sup>

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226. *Id.* at \*101.

227. *Id.* at \*102.

228. *Id.*

229. See James Pritchard, *New version of 'Harry Potter' guide to be released*, Yahoo! News, Dec. 5, 2008, [http://news.yahoo.com/s/ap/20081205/ap\\_en\\_mo/harry\\_potter\\_lawsuit](http://news.yahoo.com/s/ap/20081205/ap_en_mo/harry_potter_lawsuit) (visited Dec. 16, 2008). According to Vander Ark, "We learned a lot at the trial about what was acceptable, what would follow the fair use guidelines[.] That was not clear before. There was no law on the books that made it clear what was acceptable and what wasn't. So, coming out of the trial, I had a much better idea of what should go into the book." *Id.*; see also "The Harry Potter Lexicon," e-mail from Steve Vander Ark to author, Jan. 30, 2009; "Steve Vander Ark's Lexicon, Right to Write Center," e-mail from Roger D. Rapaport (RDR Books) to author, Jan. 31, 2009 (copies on file with author); STEVEN VANDER ARK, *THE LEXICON: AN UNAUTHORIZED GUIDE TO HARRY POTTER FICTION AND RELATED MATERIALS* vii (2009).

230. Coincidentally, one of these authors is Jean Lamb, whose fanfic story "Masks" led to the Darkover fanfic ban. See Jean Lamb, *Galley Slave*, ANALOG (Aug. 1996), reprinted in CHOOSING NAMES: MAN-KZIN WARS VIII 129 (Larry Niven ed., 1998).

The second, MZB's concern, is economic, but may also have no remedy. MZB issued a blanket prohibition on fanfic set in her Darkover universe because she was unable to publish a work that resembled a fan's story. This reaction seems excessive: many successful works of fiction become the subject of lawsuits claiming that some other author's idea was stolen, and the works on which these claims are based are rarely fanfic. J.K. Rowling herself was sued by an author named N.K. Stouffer, who claimed that the Harry Potter works copied important story elements, such as the word "Muggles," from her stories *The Legend of Rah and the Muggles*<sup>231</sup> and its sequels, including *Larry Potter and His Best Friend Lilly*.<sup>232</sup> A similar suit claimed that the baseball-themed fantasy novel *Summerland*,<sup>233</sup> published by Disney's subsidiary Miramax Books, infringed a similar story rejected by Disney.<sup>234</sup> While neither suit was successful, a distantly related suit was: author Art Buchwald, who had optioned a movie script, *King for a Day*, to Paramount, successfully claimed that Paramount had stolen the idea for the movie *Coming to America*.<sup>235</sup>

None of these claims were based on works of fanfic, and banning fanfic did nothing to protect MZB against similar claims by authors who were not fanfic authors. The fourth prong, at least, of the Section 107 test for fair use recognized MZB's right to control works that harm "the potential market for or value of" her work.<sup>236</sup> But most fanfic will not cause this particular type of market harm, which we can call story preemption, and most works that do cause such harm will not be fanfic. Ultimately the ban, and the subsequent decline of Darkover fandom, probably did more economic harm than the loss of *Contraband*, and had MZB sought to enforce the ban, many or most fanfic authors would have been able to show that their works posed no economic harm.

The third, Rowling's concern, is related but not identical to MZB's concern. As with MZB's, it may have been a mistake: Rowling owes her

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231. NANCY K. STOFFER, *THE LEGEND OF RAH AND THE MUGGLES* (Thurman House 2001) (1986). Thurman House was created by Ottenheimer Publishers "to republish the works of Nancy Stouffer." See Jim Millott, *Ottenheimer Closing Down*, PUBLISHERS WEEKLY, June 17, 2002, available at <http://www.publishersweekly.com/article/CA222465.html>; see also *Rowling v. Stouffer*, 221 F. Supp. 425 (S.D.N.Y. 2002).

232. NANCY K. STOFFER, *LARRY POTTER AND HIS BEST FRIEND LILLY* (Thurman House 2001) (original publication date disputed; the court found that Stouffer had submitted falsified evidence on this point); see *Stouffer*, 221 F. Supp. at 442-43.

233. MICHAEL CHABON, *SUMMERLAND* (2002).

234. *Shanghold v. Walt Disney Co.*, No. 03 Civ. 9522 (WHP), 2006 WL 71672, at \*5 (S.D.N.Y. Jan. 12, 2006) (finding that the plaintiffs had fabricated evidence); see, e.g., *Stouffer*, 221 F. Supp. 425.

235. *Buchwald v. Paramount Pictures Corp.*, 1990 WL 357611 (Cal. Super. Ct. Jan. 8, 1990).

236. 17 U.S.C. § 107(4) (2006).



unprecedented commercial success to the global Harry Potter fandom phenomenon, which in turn owes its intensity to years of unpaid work by people like Vander Ark.<sup>237</sup> MZB would have had a more difficult time showing that *Masks* infringed any copyright interest of hers because it copied no text from her works; she would have had to rely on a claim of copyright in the setting and characters. Rowling could show that large blocks of her text were copied verbatim; had this been done in a (non-parody) work of fiction, she would have had little trouble showing that the work was derivative and not fair use. Because the text was used in a reference work, however, the use was not derivative and was, for the most part, transformative.

Judge Patterson's decision seems to have been a relatively close call: he saw significant weaknesses in the plaintiffs' arguments and seemed to indicate that a modified version of the Lexicon would not infringe. Although it was a setback for the Lexicon and left open the problem of fanfic using copyrighted characters, *Warner Brothers v. RDR Books* may yet point the way to a world in which most fanfic, so long as it is not commercially published and does not simply copy stories or text, is fair use.

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237. On the economics of a similar situation, see Derek E. Bambauer, *Faulty Math: The Economics of Legalizing the Grey Album*, 59 ALA. L. REV. 345 (2008).